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In The

Supreme Court of the United States

October Term 1995

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION; OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 3-372; DONALD R. WATSON,

Petitioners,

v.

MOUNTAINEER GAS COMPANY, a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOUNTAINEER GAS COMPANY,
a corporation,
Plaintiff-Appellee,

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION; OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 3-372; DONALD R. WATSON,
Defendants-Appellants.

No. 95-1724

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-93-862-2)

Argued: October 31, 1995
Decided: February 26, 1996
Entered: February 26, 1996

Before RUSSELL, WILKINS, and LUTTIG, Circuit Judges.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Wilkins and Judge Luttig joined.

COUNSEL

ARGUED: John Francis Dascoli, SEGAL & DAVIS, L.C., Charleston, West Virginia, for Appellants. Joseph M. Price, ROBINSON & MCELWEE, Charleston, West Virginia, for Appellee. **ON BRIEF:** Robin J. Davis, SEGAL & DAVIS, L.C., Charleston, West Virginia, for APPELLANTS.

OPINION

RUSSELL, Circuit Judge:

This case comes before this court as union member Donald Watson and the Oil, Chemical & Atomic Workers International Union, Local3-372 challenge the district court's grant of summary judgment to Mountaineer Gas Company. The district court refused to enforce an arbitration award, which had been awarded to Watson, reasoning that the arbitrator's award failed to draw its essence from the collective bargaining agreement between Mountaineer Gas Company and the Oil, Chemical & Atomic Workers International

Union. Although we hesitate, for the integrity of the arbitration process, to condone the vacating of an arbitration award, we are compelled to do so in this instance because the arbitrator created an award that exceeded his powers and failed to draw its essence from the collective bargaining agreement.

I.

On August 27, 1991, Mountaineer Gas Company ("Mountaineer"), a public utility engaged in the transportation and supply of natural gas in West Virginia, terminated the employment of Donald R. Watson, a meter repairman in the operations department, after he failed to pass a random drug test. Challenging his discharge, Watson initiated a grievance against Mountaineer. Pursuant to the collective bargaining agreement ("the CBA") between Mountaineer and the Oil, Chemical & Atomic Workers International Union, Local 3-372 ("the Union"), Watson's grievance proceeded to arbitration.

In August 1993, the arbitrator reinstated Watson without back pay and converted Watson's permanent discharge into a disciplinary suspension. On September 10, 1993, Mountaineer filed a complaint in district court seeking to vacate the award. Mountaineer alleged the award contravened public policy and failed to draw its essence from the CBA

between the Union and Mountaineer. The district court granted Mountaineer's motion for summary judgement and vacated the award on the ground that it did not draw its essence from the CBA.

II.

The Union contends that the district court lacked the requisite authority to overrule the arbitrator's award, because the judiciary is to presumptively favor the award's validity. See Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276, 278 (4th Cir. 1992). In labor arbitration cases, it is recognized that a reviewing court generally defers to the arbitrator's reasoning. Island Creek Coal Co. v. District 28, United Mine Workers of America, 29 F.3d 126, 129 (4th Cir. 1994). And, absent any fraud by the parties or dishonesty by the arbitrator, an arbitrator's findings should never be overturned. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). After all, the parties to a collective bargaining agreement bargained for the arbitrator's interpretation and resolution of their dispute. United Steelworkers v. Enterprise Wheel & Car Corporation., 363 U.S. 593, 599 (1960). Yet, we acknowledge that arbitration awards may be overturned if the award violates well-settled and prevailing

public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong. Misco, 484 U.S. at 36, 42.

To determine whether any of these conditions existed we must examine the business Mountaineer is engaged in, the regulations it must abide by, its own operating procedures and policies, the parties to the collective bargaining agreement, and the arbitration award. Above all, we must determine only whether the arbitrator did his job--not whether he did it well, correctly, or reasonably, but simply whether he did it. Remmey v. Paine Webber, Inc. , 32 F.3d 143, 146 (4th Cir. 1994), cert. denied, 115 S. Ct. 903 (1995). Because the question of whether a labor arbitrator exceeded the scope of his authority is a question of law, this court reviews the district court's ruling denovo. Island Creek Coal Co., 29 F.3d at 129.

When determining whether the arbitrator did his job, this court examines: (1) the arbitrator's role as defined by the CBA; (2) whether the award ignored the plain language of the CBA; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the CBA's proscribed limits. As summarized by the Supreme Court:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp.,363 U.S. 593, 597 (1960).

A.

The CBA to which Mountaineer, the Union, and Watson are parties reserved to Mountaineer the following rights:

> It is agreed that there shall be no hindrance or interference with the Management of the Company in its several departments, including the determination of Company policy, which does not interfere with the conditions of the Agreement as affecting

> wages, hours of work, and working conditions. All rights of Management, except insofar as the same are expressly modified in the terms of this Agreement, are hereby reserved to the Company, and the Company specifically has the power and the right to manage the business and direct the working forces, including but not limited to, the right to hire, suspend or discharge for proper cause. . . .

The CBA also contained an arbitration provision which stated that the arbitrator shall limit his decision to the issue submitted by the parties and "shall have no authority to amend, add to, or subtract from this Agreement."

Because Mountaineer is a public utility, it is required by various state and federal laws not only to assure the safe operation of its pipelines and equipment, but to assure a drug free workplace. In particular, Mountaineer must abide by the 1988 Drug Free Work Place Act,41 U.S.C. §§ 701-7070, and the Department of Transportation Pipelines Regulations, 49 C.F.R. §§ 40 and 199, which require that certain pipeline facility operators test employees for the presence of prohibited drugs and provide an employee substance abuse assistance program.

In response to the federal and state mandates, Mountaineer instituted an alcohol and drug abuse policy (hereafter"the Drug Policy") in April 1990, which became effective in February 1991. Mountaineer's Policy committed the company to:

> [A]n alcohol and drug abuse program that emphasizes three elements: eradication of any alcohol or drug use which may imperil employees' or the public's well-being or safety; assistance and support for employees who voluntarily seek alcohol or drug abuse treatment; and firmness in dealing with employees found to be abusing alcohol or drugs. As a reflection of its commitment, the company has implemented an Employee Assistance Program ("EAP") that includes counseling for alcohol or drug problems for all employees and their eligible family members . . . .

The Drug Policy also stated that Mountaineer would conduct testing of employees to help detect abuse. The Drug Policy requires random urine specimen drug testing for "[a]ny employee in a safety-sensitive position." All positions

within the Operations Department are considered safety-sensitive.

Although an employee testing positive for substance abuse can request re-analysis, the Drug Policy cautions that such an employee testing positive for drugs, absent a legitimate medical reason for the positive result, will be promptly discharged and may be subject to reinstatement if the original sample analysis is found to be incorrect. The Drug Policy goes on to state that "notwithstanding the re-analysis option, any employee discharged because of a positive test result will be considered by [Mountaineer] for re-employment after completion of a rehabilitation program at the expense of the discharged employee and submission of proper application forms."

At the time of Watson's discharge, he was employed in a "safety-sensitive" job. On August 27, 1991, he provided a positive specimen, which showed the presence of marijuana metabolites. [1] As mandated by the Policy, Mountaineer sent Watson a discharge letter on September 10, 1991, stating the discharge resulted from Watson's failure to pass a random drug test.

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[1] Watson underwent an independent retest in which his specimen tested negative. Mountaineer was not provided any information concerning the retest until arbitration.

Watson challenged the discharge, and his complaint went to arbitration. The arbitrator determined:

> (1) Watson occupied a "safety-sensitive position;"
> (2) Mountaineer had a vested right under the CBA to implement a mandatory random drug testing for employees;
> (3) The findings made by a previous arbitrator sustaining the validity of the Policy were a matter of res judicata;[2]
> (4) The chain of custody for Watson's positive specimen was sufficient; and
> (5) The procedure used for testing Watson's specimen was not defective.

The arbitrator nonetheless continued:

> The Arbitrator does, however, agree with the Union that [Watson's] unblemished work

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[2] When Mountaineer originally implemented its Policy, the Union challenged the reasonableness of the Policy's immediate termination provision for a positive drug test. The Union's challenge went to arbitration. In January 1992, the arbitrator denied the Union's grievance concluding that given the nature of Mountaineer's business, the Drug Policy and its provision for immediate termination without the opportunity for rehabilitation, were not an unreasonable exercise of Mountaineer's management rights.

history over 15 years of employment with [Mountaineer], the Arbitrator finds that there was not just cause for his termination. The Arbitrator rejects the Policy as applied here and finds that just cause for immediate termination did not exist under these circumstances.

Employers implement Employee Assistance Programs in order to rehabilitate and retain valuable employees with personal problems. Substance abuse is always a key element of any properly implemented EAP. Often it takes being 'caught' or the threat of discharge or discipline, for employees to seek professional help. Grievant's/[Watson's] inability to utilize this program after testing positive undermines the purpose and effectiveness of the EAP.

The Arbitrator has great difficulty with a substance abuse policy that permits rehabilitation for voluntary assistance but terminates without recourse anyone who is `caught' by a positive drug test. Since [Mountaineer's]

> Policy was upheld by Arbitrator Beilstein, revision or invalidation of the Policy on its face is improper since the matter is resjudicata. Although Arbitrator Beilstein upheld the Policy on its face that does not mean that there are not individual exceptions to the strict application of the Policy. Laws and policies upheld on their face can always be challenged in their application. The Arbitrator agrees with the Union that leniency should have been afforded [Watson] since he tested negative in February and September and showed no signs whatsoever of poor or adverse job performance.

(emphasis added).

B.

The Union seeks to collaterally attack the Drug Policy by reasoning that the arbitrator was not required to uphold employee discharges mandated by the Drug Policy because the language of the CBA permits Mountaineer to discharge only for "proper cause." The Union argues therefore, that the arbitrator only had to determine whether Watson's discharge was for "proper cause" rather than assume

that a violation of the Drug Policy constituted "proper cause."

Contrary to the Union's contention, we find that the Drug Policy was to be interpreted and enforced in accordance with the CBA. A valid and proper policy promulgated by an employer pursuant to a collective bargaining agreement is enforceable; it need not be specifically incorporated by reference into the collective bargaining agreement. Consequently, when the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, any rules or policies promulgated in accordance with that authority are thus incorporated into the collective bargaining agreement and have the force of contract language. General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services, Inc. 838 F.2d 794, 796, 799 nn. 1 & 4 (5th Cir. 1988).

The CBA gave Mountaineer the requisite authority to enforce the Drug Policy and to discharge Watson for violating the Drug Policy. The arbitrator's role clearly prohibited him from amending, adding to, or subtracting from the CBA. Therefore, by converting Watson's permanent discharge into a disciplinary suspension, the arbitrator did not do his job. Instead, the arbitrator blatantly ignored the unambiguous language of the Drug Policy and fashioned a modified penalty that

appealed to his own notions of right and wrong. We agree with the district court's holding that the arbitrator lacked the authority to create an individualized exception to the strict application of the Drug Policy. And the words "proper cause" of the CBA cannot be the loophole through which the arbitrator bypasses the Drug Policy's mandatory language to implement his own brand of industrial justice. In reinstating Watson, the arbitrator illegally created an exception to the strict application of the Drug Policy's mandatory termination. By fashioning an entire new remedy and infusing his personal feelings and sense of fairness into the award, the arbitrator created an award that failed to draw its essence from the CBA, which clearly reserved to Mountaineer the right to promulgate and enforce such drug policies.

III.

For the foregoing reasons, the district court's decision to vacate the arbitration award and grant summary judgment to Mountaineer Gas Company is AFFIRMED.

FEDERAL MEDIATION AND
CONCILIATION SERVICE

ROBERT A. CREO
ARBITRATOR

Entered August 25, 1993

In the matter of Arbitration
between

MOUNTAINEER GAS,
Employer
and

OIL CHEMICAL & ATOMIC
WORKERS INTERNATIONAL UNION,
LOCAL 3-372
Union

OPINION AND AWARD

FMCS Case No.:	92-21366
Arbitrator Case No.:	92-057
Employer Advocate:	Deana Cooper, Esquire
Union Advocate:	Michael Paesani, Esquire
Subject:	Discharge
Grievant:	Donald R. Watson
Date of Hearing:	May 4, 1993
Location of Hearing:	Charleston, West Virginia
Briefs Filed:	June 30, 1993
Opinion and Award Issued:	August 25, 1993

Statement of the Award:

The Grievance is granted in part and denied in part. Grievant must enter the Employees Assistance Program and take a drug test before returning to work. Grievant shall receive no back pay and his discharge shall be converted into a disciplinary suspension. The Employer may drug test Grievant at their sole discretion. The Grievant may be terminated for testing positive and/or refusing to be tested. Pursuant to the request of the parties, the Arbitrator retains jurisdiction over the implementation of this Award.

APPEARANCES:
For the Employer:
Deana L. Cooper, Esquire, General Counsel

Also Appearing:
N. Edward Eagloski, Esquire
Moses J. Skaff, Jr., Manager of Human Resources
Susan A. Anderson, Director of Human and Administrative Services
Nick Nuzzo, Labor Relations Administrator
Ida Taylor, Human Resources Analyst
N.E. "Pete" Hedrick, Manager of Operations Services
Tondra Bates, Roche Laboratory
Emilie McDevitt, Roche Laboratory
Dr. Paula Childs, Roche Laboratory
Dr. Athena Howard, Roche Laboratory
Morris Lindsay, Retired Manager of

Labor Relations
Brent Null, IS Department

For the Union:
Michael Paesani, Esquire
Terry Michael Jordan, Esquire

Also Appearing:
Gary D. Woodall, President of OCAW
Local 3-372
Flem Stroud, Secretary-Treasurer of OCAW
Local 3-372
Marshall Strawther, President of
The Physicals Company
Dr. Chul Seoung, MRO of The
Physicals Company
William Clay, Co-worker
Donald R. Watson, Grievant

PRELIMINARY STATEMENT

The parties, Mountaineer Gas (Employer or Company) and the Oil Chemical & Atomic workers International Union Local 3-372 (Union) having failed to resolve a dispute involving the discharge of Donald R. Watson, proceeded to final and binding arbitration pursuant to the terms of their collective bargaining agreement (Agreement). The Agreement runs from December 1, 1988 through 1990. Robert A. Creo, Esquire was appointed to serve as impartial arbitrator from a panel supplied by the Federal Mediation and Conciliation Service. The Arbitrator assigned his own

Case Number 92-057 to the Grievance designated as FMCS Case # 92-21366. The parties have agreed and stipulated that they would waive the contractual requirement found in Article XXVIII of the Agreement, starting on page 52, of a board of arbitration and that the matter shall be decided by a sole impartial arbitrator. An oral hearing was held on May 4, 1993 at the Old Daniel Boone Hotel, in Charleston, West Virginia. Both parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. The witnesses were sworn. A stenographic record of the hearing was made and paid for by the Employer.

The parties stipulated to the Issue and that the Grievance was arbitrable since there were no timeliness or other procedural or Jurisdictional questions. Both parties elected to submit briefs postmarked by June 30, 1993. Both parties agreed the Arbitrator would retain jurisdiction over any award involving full or partial granting of grievance. One party objected to publication of the Opinion and Award.

BACKGROUND AND SUMMARY OF TESTIMONY

In February, 1991, Mountaineer Gas Company implemented their random drug testing program in accordance with the Federal Department of Transportation's guidelines. The Employer is a public gas

utility operating in the state of West Virginia and has approximately 200,000 customers that it services. The Company implemented this program for the safety-sensitive personnel of the Company and it was decided that the individuals who are a part of the operations department of the Company are in a safety-sensitive position. This is set forth in the Alcohol and Drug Abuse Policy which has the effective date of February 1, 1991. It is on page two of six at Section 3.1.3. It states:

> All positions within the operations department are considered safety-sensitive positions.

This policy was distributed to all employees of the Company. Prior to instituting this policy, the policy had been negotiated with all unions in the state.

Grievant Donald Watson is a Meter repairman A and a part of the operations department. Mr. Watson had a copy of this policy. He knew that if he tested positive for any drug listed in the policy he would be terminated.

On February 7, 1991, Grievant submitted to the first random .drug test and his result was negative. On August 27,, 1991, he again was randomly tested and the result was a positive test for marijuana.

The cutoff levels for the drug is also a part of the Mountaineer Gas Company policy. For marijuana the initial test is a hundred nanograms per milliliter with a confirmatory test being fifteen nanograms per milliliter. Mr. Watson was twenty-four nanograms per milliliter.

When Grievant tested positive, the Company applied the policy at 2.1.4 that states:

> The Company shall take the following action when the tests reveal persons have been abusing alcohol or drugs ... b. Drugs, immediate termination from Company employment.

The Company also applied Section 3.4.1 which states:

> Notwithstanding the re-analysis option in subsection h, if an employee does test positive for drugs and there is no legitimate medical reason for the positive test result, the employee will be promptly discharged. In the event the employee has requested re-analysis of the urine sample and the original analysis is then found to be incorrect, the employee will be promptly reinstated to employment.

According to the Company, Grievant had notice of the repercussions of a positive test result and never challenged the policy before, even prior to his first test. Based upon policy and procedures, the Employer discharged Grievant Donald Watson for just cause.

Moses G. Skaff, Jr., has been Manager of Human Resources for Mountaineer Gas Company since January 13, 1992. He testified that Morris Lindsay previously held this position. Mr. Skaff stated that one of his responsibilities is to supervise the implementation of the drug testing program at the Company. He said that this program is required by the Department of Transportation because the Company is an operator of a gas pipeline. Mr. Skaff stated that Mountaineer operates primarily in West Virginia and has over 200,000 commercial and residential customers along with few industrial ones.

Mr. Skaff testified that the policy was developed pursuant to the DOT guidelines and has two types of testing. It has an initial cutoff test as defined in the policy and then it has a gas chromatography/mass spectrometry (GC/MS) test. The levels are set up and mandated by the DOT regulations at one-hundred for the initial cutoff levels. Once the one-hundred nanograms per milliliter (NG/ML) is detected, it is essentially qualifying that there is that in the system.

Mr. Skaff stated that the second test is a quantitative test which is done by the GC/MS test performed at levels of fifteen NG/ML and those are set by DOT regulations. The fifteen cutoff level on the quantitative test is set to rule out any false positives, any secondary smoke issues, and in very finite determination of what the quantity is in their system.

Mr. Skaff testified that the Company conducts pre-employment testing, reasonable suspicion testing and post-accident testing. Reasonable suspicion testing, as described in the policy, is by two supervisors that have been qualified in the review of the issue. Post-accident testing occurs when there is a reasonable suspicion that the accident was alcohol and/or drug related. Depending upon the severity and symptoms that have been reviewed, it could be subject to alcohol testing.

At the very beginning of the implementation of the Drug and Alcohol Abuse Policy the entire employee population was included in the random drug testing until the West Virginia Supreme Court mandated that only safety-sensitive positions could be randomly tested, Mr. Skaff stated.

Mr. Skaff said that the Company began its drug testing program in February 1991. He stated that as Director of Human Resources he has the care, custody, and control of employees

personnel files and did have Grievant Watson's.

A letter dated September 19, 1991, from Mr. Harry Ferguson and Norvin E. Hedrick informed Grievant Watson that his employment with the Company was terminated effective September 19, 1991, because he was placed on suspension September 10, 1991, without pay, pending an investigation of his positive drug test. Mr. Skaff stated that at the time of the testing Henry Ferguson was the Manager of the meter shop and Mr. Hedrick was the Manager of Operations. Mr. Watson's position was Meter Repairman A and is a part of the Operations Department at the Company.

Mr. Skaff explained the Company's Drug and Alcohol Policy is given to all employees directly and discussed by their supervisors. He testified that there were various meetings held with the Union at the time of implementation to further discuss the issues.

Mr.Skaff said that when an employee is selected for a random drug test they sign an employee acknowledgement and consent form which states:

> I give my consent to Mountaineer Gas to collect a urine sample from me and to forward the urine sample to Roche Biomedical Laboratories. I hereby acknowledge receipt of Mountaineer Gas Company's

> Alcohol and Drug Abuse Policy/Procedure. understand that compliance with it is a term and condition of my employment, or eligibility for employment, and that any violation by me of the policy may result in discipline, up to and including discharge.

Mr. Skaff stated that there is a signature line, a line for the employee's social security number and a line for a witness, signature.

Sections 2.1.4 , 3.1.3, and 3.3 of the Company's Alcohol and Drug Policy were all applied to Grievant Watson's discharge to ensure everything was in compliance and pursuant to the policy, Mr. Skaff testified. There is also a section of the policy which permits the employee, one time only, to voluntarily seek rehabilitation prior to testing except for post-accident testing. Once an employee has submitted to testing they may not ask for rehabilitation at that time. Mr. Skaff also testified that any employee having any problems may use the Company's EAP, Employee Assistance Program.

According to Mr. Skaff an employee may go into the EAP program but it does not have any affect upon the testing policy. They must go to EAP prior to the test actually being performed in order to waive the test. The actual test is the

cutoff point to when one may request rehabilitation or assistance from the EAP. An employee may request a waiver of the test up to the point of actually handing the specimen over to the testing authorities.

Mr. Skaff stated that the termination letter to Grievant Watson referred to section 3.4.1 which allows the employee to request that the same urine sample be tested again if it has tested positive. There is also a split sample provision which puts the urine into two separate vials that is different than the reanalysis. The reanalysis tests the same vial twice. Mr. Skaff said they have an employee request for waiver of the split sample form and for reanalysis.

Mr. Skaff testified that the entire Drug and Alcohol Policy was challenged in arbitration by the Utility Workers of America in the Wheeling division. OCAK Local 3-372 did not participate in this arbitration because there were three other unions involved and they chose not to do so. The whole policy was challenged and the Company was upheld saying that the policy was reasonable given the DOT regulations. The case was heard on October 15, 1991 and awarded January 27, 1992 by Arbitrator James Beilstein.

Mr. Skaff identified a letter dated September 10, 1991 form Henry Ferguson and Norvin Hedrick to Mr. Donald Watson.

Mr. Skaff stated that the purpose of this letter was to inform him of his suspension without pay pending an investigation of his positive drug test result and advising him that he had sixty days from September 9, 1991, to request in writing a reanalysis by Roche Laboratories of the original sample. Attached to this letter is a request form for re-analysis, typed in saying, I, Donald R. Watson, hereby request a re-analysis of my urine sample submitted on blank. Mr. Watson did not request a re-analysis to the best of Mr. Skaff's knowledge.

Mr. Skaff stated that the options to seek re-analysis and a split sample were Company-implemented options along with being required by the DOT.

Mr. Skaff testified that the Company's Medical Review Officer (MRO), Dr. Athena Howard, reported to them that Mr. Watson had tested positive. He stated that her report was in accordance with the Company's procedures. He stated that part of the policy is the Drug Testing Results Report which is what the MRO initially provides to the Company. One of these is completed for every random test result that is performed. It simply identifies the social security number, specimen identification number, and says:

> I have reviewed the laboratory results for the specimen

identified by this form in accordance with applicable federal requirements. My final determination/verification is... (with a check box).

This report is then sent to the Human Resources Department designee at the time. This was the form used to transmit the positive results of Mr. Watson. This form is also used for negative test results. This form is kept in his department, Mr. Skaff stated.

Mr. Skaff read Mr. Watson's Drug Testing Result Report which noted that he tested positive for the cannabinoids as Carboxy THC marijuana, signed by Dr. Athena Howard. He also read Grievant's Acknowledgement and Consent form acknowledging the receipt of the Alcohol and Drug Abuse Policy and understanding of its compliance, terms, and conditions pertaining to the policy.

Mr. Skaff then stated that the social security number on the acknowledgement and consent form matched the number on the Drug Testing Results Report.

Mr. Skaff explained the form titled Applicant Request for/Waiver of Split Sample. It is a form that is filled out at the time the employee is taken to a test site after he has been randomly selected. The top part of the form is a request for a split sample while the bottom is a denial for a split sample.

Grievant Watson waived his right to a split sample on a form dated August 27, 1991.

Mr. Skaff testified that the testing guidelines were put into the policy to insure that the employee knew what was transpiring and that all things were conducted properly. These guidelines essentially cover all the various areas of the test, the random, the reasonable suspicion testing, the pre-employment testing or transfer and the post-accident testing.

Mr. Skaff stated that under the random testing, which Mr. Watson tested under, it states in item number one: Human Resources will have random names in advance of testing day and will call the appropriate collection site to tell them how many employees will be coming and on what day. Number two talks about Human Resources notifying the section head, etc. Number three says the section head will make appointments with the testing site. Number four has the section head arrange transportation. Number five mandates that if the employee has not signed an acknowledgement and consent form, he or she must sign one before they go to the collection site.

According to Mr. Skaff random tests occur generally every week with the day chosen being random. The number of employees chosen per week are random also. Once it has been determined how many employees will be randomly tested

and on what days the information services department (IS) makes a random run through the computer for names. The contact with the IS department is done electronically and when the names are selected the IS Department calls Mr. Skaff's department. The names are then picked up by him or his assistant in a sealed envelope.

Mr. Skaff said the DOT guidelines require that at least fifty percent of the safety-sensitive population be tested on a calendar basis. The IS department makes the run and contacts the Human Resource Department to pick it up. Human Resources usually contacts the respective department the first thing in the morning and speaks to the supervisor. They tell them who was picked, give a site location and make sure they understand where they are to go and what they are supposed to take with them.

Mr. Skaff testified that the supervisor has been trained in the proper procedure for signing up and making sure everything is one correctly. The supervisor has the employee sign all relevant documents then takes him or her to the drug testing site. The test is then performed and they return to work. If there are any complications between that time, it is instructed that the supervisor contact Human Resources pursuant to the policy.

Mr. Skaff stated that Mr. Paesani asked him to do a survey of the Company's

random drug testing to see how many employees have been tested previously and the amount of the tests that they had been selected for. Mr. Skaff said that regarding this request memorandums dated April 29, 1993 and May 4, 1993 were sent to D.L. Cooper which essentially showed three columns containing the years '91, '92, and '93, the number of employees in each safety-sensitive division, the number of employees in each area and the number of employees tested in each area. It goes into further detail listing how many have been tested once, twice, or three times. All employees of the meter shop location where Mr. Watson worked is listed.

The third page lists forty-nine employees that were tested two or more times during 1991 along with these dates, Mr. Skaff stated. He said that this list shows that there were several people that were tested more than once. The employees are identified by number rather than names to ensure confidentiality.

Mr. Skaff testified that this survey was done only at the request of Grievant's counsel, Mr. Paesani, and that this is not an ordinary-course-of-business record.

Mr. Skaff stated that he does not keep any records that would indicate demographics, race, age, or seniority as it relates to drug testing. Drug testing information relating to an employee is not retained in their personnel file and

that the Company follows the DOT guidelines for keeping separate files for all drug testing documentation. Mr. Watson's information regarding his drug tests is contained in his drug testing medical file.

A letter dated September 10, 1991 from Dr. Athena A. Howard of Shared Services, Inc. (SSI), to Mr. Morris Lindsay of the Company essentially notified the Company that Mr. Watson had a positive urine drug test. Mr. Skaff said that the letter also stated that Grievant met with SSI Physical on 9/9/91 at ten a.m. to review his positive screen. Grievant presented a driver's license which confirmed the social security number of the drug screen which tested positive. Mr. Skaff stated that the letter stated that the Roche Medical Laboratories, Inc. drug testing custody and control form retained by SSI Physical did not include an employee signature but that the specimen identification number and social security number did confirm the employee's identification.

Mr. Skaff stated that in the letter Grievant Watson denied using drugs but that he had recently attended the regatta with a carload of friends that were smoking marijuana. The letter also said that Mr. Watson requested reexamination of the initial urine and that Dr. Howard instructed him to get a release from the Company and that she would also request

the Roche Lab to perform a quantitative test.

Another letter dated September 18, 1991 from Dr. Howard of SSI to Morris Lindsay of the Company essentially requested that Roche Lab perform a repeat urine drug screen and a quantitative analysis on the specimen and asked them to confirm again the gas chromatography and mass spectrometry technique testing, Mr. Skaff testified. The Company received two other letters from Dr. Howard indicating a positive drug test result, Mr. Skaff stated.

Policy procedure 2.1.2 states:

> There is considerable evidence showing that employees who abuse alcohol or use illegal drug are less productive, less reliable and are absent more frequently than their fellow employees, resulting in increased costs and risks for the company. There is also evidence that shows job performance impairment can result from use or abuse of certain prescribed drugs.

There is no indication in Grievant's personnel file that the Company ever had a problem with Grievant's production or with absenteeism. Grievant's position changes from Meter Repairman D to Meter

Repairman C then B to finally A constitutes promotions.

A letter dated May 13, 1987 from Pete Hedrick to Bob Moore basically stated that meter repairman D posted for the meter shop was awarded to Donald Watson and that due to his experience, his job classification and pay grade should be that of Meter Repairman B, Mr. Skaff testified. Mr. Skaff stated that Company's payroll change report and employee profile of Grievant Watson indicates three promotion notations along with a transfer demotion.

Mr. Skaff testified that there is no performance evaluations of Union employees and that some of the pay increases are definitely contract settlements. He also stated, however that Grievant Watson has not been a problem employee prior to this testing.

Mr. Skaff affirmed what 2.1.4 and 3.1.2 of the Company's drug testing policy stated and that all employees should understand the difference between the safety and non-safety sensitive positions. He stated that the Union knows the Company's position on this because they had meetings regarding the drug policy and that the employees should know because information was sent to the individuals' homes.

According to policy, sub-part i, if an employee does test positive for drugs and there is no legitimate medical reason for the positive result, the employee

will be discharged, Mr. Skaff testified. Mr. Skaff read a drug testing form which went to Roche Laboratories and stated:

> To be completed by employee or applicant providing specimen. (Blank area where name, date, daytime phone, date of birth, and signature should be.)
>
> I certify that I provided my urine specimen and that the specimen bottle was sealed with a tamper-proof seal in my presence; and that the information provided on this form and on the label affixed to the specimen bottle is correct.
>
> Should the results of the laboratory tests for the specimen identified by this form be confirmed positive, the Medical Review Officer will contact you to ask about prescriptions and over-the-counter medications you may have taken. Therefore, you may want to make a list of those medications as a "memory jogger." This list is not necessary. If you choose to make a list, do so either on a separate piece of paper or on the back of your copy, copy four, donor, of this form. Do

not list on the back of any other copy of the form. Take your copy with you.

To be completed by person collecting specimen after donor has completed 7. See copy three of form.

Collector's name: Tondra M. Bates; collection date: 8/27/91; collection site, facility name and location: RBL, 312 6th Avenue, South Charleston, West Virginia; (304) 744-7000.

Split sample collected in accordance with applicable federal requirements. Yes or no.

I certify that the specimen identified on this form is the specimen presented to me by the donor providing the certification on copy three of this form, that it bears the same identification number as set forth above, and that it has been collected, labeled and sealed in accordance with applicable federal requirements. Signed Tondra Bates, signature of collector.

Mr. Skaff stated that Columbia Gas of West Virginia is a predecessor to Mountaineer Gas Company which was formed in 1984 when Allegheny and Western

purchased the distribution process of Columbia. Mountaineer retained locals 628 and 373 in this area and the different unions up north. Mr. Skaff testified that to the best of his knowledge there are different policies, procedures and contracts. Mr. Skaff stated that the promotions presented were upgrades due to the language of the contract and not merit based.

Brent Null stated that he has been employed by the Company since February 1989. His Position of Systems Analyst consists of designing and implementing computerized systems for the Company. He has approximately eleven years of computer experience along with graduating from the National Institute of Technology and acquiring a diploma in business computer programming.

Mr. Null testified that he designed the random sampling selection program the Company now uses in order to identify employees to be selected for random drug testing. He stated that he was satisfied that Mr. Watson's name was generated in a random manner.

Mr. Null stated that they use a three-digit number for each employee in order for the computer to kick out their social security number. The pool of employees involved in the process are all safety-sensitive employees for the Company throughout the state.

Mr. Null said that the employees are not put into the pool by their names but

by their social security number and are entered in sequential order, lowest to highest.

Tondra Bates stated that she has been employed with Roche Biomedical Laboratories since March 1986. Her position of senior phlebotomist includes duties such as drug testing, DOT, paternities and filling out forms for drug screens. For the drug testing she fills out the paperwork, watches the specimen being taken, brings it back, and mails it out. She is a nationally certified phlebotomist.

Ms. Bates stated that she brought with her the drug testing kit, the DOT form that they fill out and the original copy of the testing that was done on Grievant Watson. On the log docket there is a tracking number, date, account number, name as it appears on his license, and social security number. Ms. Bates stated that she verified his West Virginia driver's license, initialed the form, and put the temperature of specimen on there. The date of the specimen is listed as 8/27/91. Ms. Bates testified that the temperature of the specimen was ninety six degrees Fahrenheit and that the range required by the DOT is between ninety and one hundred.

Ms. Bates stated that she brought the original drug testing custody and control form that was completed by her on 8/27/91. This form indicates what type of identification was used, whether the

test is random or pre-employment and the temperature of the specimen. The person then signs it. This is all according to federal guidelines.

Grievant Watson was randomly being tested under DOT profiles which are more or less for street drugs, Ms. Bates testified. On the custody and control form at number seven are Mr. Watson's social security number and signature along with the date of 8/27/91. Number eight contains an area for the donor to complete when seven is finished. It includes information stating that she has received the specimen and requires her to sign it, date it, and the location where it was done.

Ms. Bates explained that the form also says "spec ID number" which is a tracking number for the specimen. Copy five collector has a bottom part which gets affixed to the bottle. She stated that there are several attachments to the entire form which go to various locations and/or individuals.

Ms. Bates defined the procedures that she follows when taking a specimen for drug testing. She stated that the first thing they do is ask for and check identification and this is entered into the log book. It is then marked whether this test is random or preemployment.

Ms. Bates said that they then go to the bottom, line five where it says received specimen from the donor and this is where she signs and dates it. She

then fills in information such as where the specimen will be sent and who releases it. Section six marks what type of test this is, what profile, and the chain of custody handling. The bottle is then taken out of the kit and is opened in the presence of the patient. The social security number is put on a sticker on the bottle where she initials it and dates it.

Next, Ms. Bates testified, the bottle is given to the patient and his social security number is verified. At this point he is asked to wash and dry his hands. She then walks over to the commode and urinal with the patient and puts dye in the water. The patient is asked to fill the container half full and not to flush. Ms. Bates stated that she then stands outside the door and the door is left open.

When they are done they come out and hand me the specimen, Ms. Bates said. They walk back to the collection site and mark the temperature in the log book. The specimen is then sealed. Ms, Bates said that she normally has the patient seal the specimen and makes sure it is tight. The specimen is then put into the bag. The patient fills out number three, line seven and is directed to read the donor certification at the bottom.

Ms. Bates testified that she has the patient sign their name, date and initial that it is their specimen and this part goes across the bottom of the bottle.

Then she completes her portion of the form. Everything is then sealed up with all signatures and initials to verify identity. The copy given to the donor asks if they have taken any prescription drugs in the last thirty days and to voluntarily list them.

The fifth copy is given to the collector and the sixth to the supervisor that came with them, Ms. Bates stated. The last copy is for the split sample if there is one. Ms. Bates did not have copy number one with her because it goes to the testing site with the specimen. Grievant Watson's specimen was sent to the Columbus laboratory by courier.

Ms. Bates verified that copy number three had been filled out and signed by the Grievant and that she certified on number eight of copy three that she witnessed him do that. She agreed that on section seven there was no signature, date, or name of Grievant.

Ms. Bates stated that there is the Grievant's signature on her copy, copy five. She explained that what may have happened was that when Mr. Watson signed the forms, copy three which goes to the medical review officer may have been pulled up so that only forms four and five retained his signature. Ms. Bates testified that she physically saw Grievant Watson sign the forms. Copy five had a carbon copy of a signature on it.

Ms. Bates testified that the pages of copy are normally hooked through the side together. She agree that on copy three she verified that Mr. Watson signed it but that there was no signature on it. Copy six, which is the Employer's copy, was signed by the Grievant. She stated that the specimen ID number for Mr. Watson was 9186517 and that this number tracks the specimen through the process to ensure confidentiality. Ms. Bates stated that her signature is on copy number one and three.

Emilie McDevitt testified that she is a group leader in the serology department at Roche Biomedical Laboratories in Columbus, Ohio. She stated that she has the care, custody, and control of drug tests and their results that are submitted to her lab for testing. She stated that a forensic drug testing litigation support package includes the documents that are processed at her lab. On it is an accession number and the number on this one is 2407140081 and the social security number is 234-94-3365. This is Grievant Watson's number.

Ms. McDevitt stated that section three is the GC/MS test results and section four is the quality control. She stated that when running a batch it contains properly identified quality control samples. Each control sample is numbered with an indication of the THC level. She stated that her signature is

shown throughout the package and did take part in the testing of the specimen.

Marshall Strawther testified that he is the President of the Physical Company which does drug screen collection as well as physicals for companies. Mr. Strawther stated that through his company and their work they have determined that through passive inhalation a person can read as high as twenty-eight nanograms. He testified that Mr. Watson was retested on 9/10/91 for marijuana and the result which completed on 9/11/91 was negative. Mr. Strawther stated that it is possible that the test on 8/27/91 and 9/10/91 are both accurate and not inconsistent.

Mr. Strawther stated that he does not have a medical degree although he is a paramedic and attending a physician assistant program. He does not have any education in toxicology. He stated that the vice president of MetPath Laboratories was the one that told him a person could pick up passive inhalation at twenty-eight nanograms. He stated that the results of the drug tests come back to the MRO of his company, Dr. Seong.

Mr. Strawther said that he is familiar with the DOT guidelines and that their cutoff levels for marijuana are one hundred immunoassay and fifteen for GC/MS. The GC/MS is the back up test for the initial screening.

Mr. Strawther stated that he is familiar with the book that gives the

medical review officer guidelines to follow while reviewing someone's drugs for positive tests and read the following:

> Inadvertent exposure to marijuana is frequently claimed as the basis for a positive urine. Passive inhalation of marijuana smoke does occur and can result in detectable body fluid levels of THC in blood and of its metabolites in urine. Clinical studies have shown, however, that it is highly unlikely that a non-smoking individual could unknowingly inhale sufficient smoke by passive inhalation to result in a high enough drug concentration in urine for detection at the cutoff level currently used by the federal program.

Mr. Strawther testified that his company did not test the same specimen that was tested on 8/27/91.

Dr. Chul Seong stated he is an independent contractor with the Physical Company as a Medical Review Officer. He stated that he is familiar with the MRO manual. He testified that he is not a toxicologist. He could not professionally support Mr. Strawther's claim of passive

inhalation causing positive drug test results.

Dr. Athena Howard stated that she is now in private practice but was employed by Shared Services Inc., during August and September of 1991. She stated that she was the Medical Director of the Preventive Services of Shared Services, Inc., and that through this position she came to be the Medical Review Officer of the Company. Her duties for this position included reviewing drug test results.

Dr. Howard testified that she has had courses and training in pharmacology and drug abuse disorders. She stated that she recalled reviewing Grievant Watson's test results and went and obtained his file from Shared Services for this hearing. Grievant's social security number, specimen ID number and accession number were identified. She stated that she obtained his social security number from him at a meeting on 9/9/91.

Dr. Howard stated that she took progress notes at this meeting and they read:

> Identified myself as the medical review officer for Mountaineer Gas. Driver's license of patient presented and confirmed ID as Donald Watson, number 234-94-3365. Over the counter drugs used and

> presented were Diet Pep and Dilotab. Mr. Watson was told that the drug screen was positive for cannabinoid. He denied using the drug. He states he was recently at the regatta with a carload of friends who were smoking marijuana but that he did not use any drug. I informed him that re-testing was available and that Mountaineer Gas would be informed of the current results.

She stated that she received the positive results from Roche Biomedical Labs and copy one of Form 502 are those results. The date of the teleprinter copy was 8/30/91 and said:

> Positive for the initial screen cutoff for cannabinoid and also positive for carboxy THC by GC/MS confirmation, fifteen nanograms per milliliter.

Dr. Howard said that she discussed the results with Grievant Watson and heard his explanations. She stated the only reason a person would test positive for THC would be if they had cancer and undergone extensive chemotherapy and were taking the antiemetic drug called Marinol. Mr. Watson does not have cancer

and did not provide a legitimate medical reason.

Dr. Howard stated that she sent the form titled Mountaineer Gas Company Drug Testing Results Report to inform the Company of the positive test results for marijuana on 9/9/91. She also provided the Company with a written letter regarding her meeting with the Grievant dated 9/10/91. The letter was addressed to Morris E. Lindsay and stated that she would request a quantitative examination of the urinalysis for marijuana.

A letter dated 9/11/91 to Roche Labs requested the quantitative drug test results because as the MRO she has the privilege to find out the quantitative amount of any positive result, Dr. Howard testified. This is in accordance with the DOT guidelines. Roche reported back to her by letter dated 9/16/91 stating that the level was twenty-four nanograms per milliliter. Roche also provided a telecopy of the GC/MS confirmation with a positive test result but not the specific level.

Dr. Howard testified that she again informed the Company of these results with a letter dated 9/18/91 and that she communicated this information to Mr. Watson with a letter dated 9/22/91.

Dr. Howard stated that she noted in her files that one copy of the drug tests forms did not contain Mr. Watson's signature and this is included in her

progress notes of 9/11/91. It reads as follows:

> It has become evident that the Roche Biomedical Lab, Inc., drug testing custody and control form retained by SSI Physical does not include the employee's signature. The copy retained by Mountaineer Gas and by Roche does included the proper signature. The specimen ID number and social security number confirms the employee's identification.

Dr. Howard stated that she also verified his social security number by his driver's license which he presented at the meeting. The omission of his signature did not have any bearing on her decision due to the fact that his signature was on other copies and signified that he understood his testing.

Dr. Howard stated that she became aware of the missing signature on 9/10/91 when it was documented in progress notes. Ed Phillips, Director of Preventive Services of SSI, wrote a note which basically said that they needed to write to the Company to say that there is no change in their recommendation due to the retest.

Dr. Howard said that she was an employee of SSI and not a subcontractor. She stated that she is not in associated

with Roche Biomedical Labs and that the Roche Lab in Dublin, Ohio did the testing of the urinalysis.

Dr. Howard testified in her medical opinion to a reasonable degree of medical certainty that indirect inhalation of marijuana smoke would not cause a positive reading at the level of Grievant's reading. She stated that this is confirmed in the MRO manual from the DOT, the MRO manual from the American Trucking Association and the NIDA Health and Human Services MRO manual.

Dr. Paula Childs testified that she is employed with CompuChem Laboratories which is a subsidiary of Roche Biomedical Laboratories. She is the Vice President of Toxicology Operations and is a toxicologist. Her testimony is qualified as expert. She stated that a toxicologist is trained in the study of drugs, their effect on the human body, including their ingestion, metabolism, excretion, pharmacological affects.

Dr. Childs stated that she is familiar with Grievant's packet and his positive test results. She said that very extensive studies have been done to scientifically investigate the affect of passive inhalation on urine excretion of marijuana metabolites. The results basically were that it would have to a very intense and extreme exposure to marijuana smoke in a passive situation to result in a positive drug reading. She stated that the first positive reading

resulted after the fourth day of exposure in the example she cited.

According to Dr. Childs, Mr. Watson's situation would not qualify him for the passive inhalation category. Her professional opinion would be that Mr. Watson is not a victim of passive inhalation and is based on several factors such as that he did not experience any irritation to his eyes or nose, that he described the smoke as moderate, and that exposure to the smoke for approximately a one time period of an hour and a half would not register a positive result. She did agree that an automobile is smaller than the confined bathroom used in the study.

Dr. Childs stated that the time of exposure is very important to whether passive inhalation is a causation for testing positive to marijuana. She stated that it is her understanding that the cutoff level by the DOT set at fifteen nanograms per milliliter was to preclude the argument of passive inhalation.

Dr. Childs recognized that people register THC in their urine by passive inhalation and that one person could test differently than another. She agreed that the quality and level of marijuana has a bearing on the registering of THC in the urine. She said that she is aware of studies that state secondhand cigarette smoke can adversely affect a person that absorbs it.

Dr. Childs gave her professional opinion that Grievant Watson is not a victim of passive inhalation of marijuana smoke and that according to his tests results inhaled and smoked a joint in the normal and customary manner. She stated that she believed he smoked it a few days previous to being tested or perhaps longer if he is a chronic user.

Dr. Childs stated that a negative test on September 10, is possible regardless of whether he is long-time user or not. She says there may have been traces of THC in his urine on the 10th of September but weren't high enough to reach the cutoff level thereby giving him a negative result.

Donald Watson testified that he was hired by Columbia Gas Transmission Corporation in March of 1976. He stated that he started out as a mail messenger for Columbia and then progressed to a utility man then to an operator. He then transferred to Columbia Gas of West Virginia in the meter shop. He worked from the D level to an A level until he was terminated in September 1991.

Mr. Watson stated that to become an A man you had to pass a test from the Public Service Commission to be certified to test domestic meters. He said that he in-tested and out-tested meters; after they go through the assembly line he tests them for to the speculations provided by the Public Service Commission

and passes them on to another man that tests them for leaks.

Grievant Watson testified that he was terminated for failing a drug test. He was notified of the positive results by the MRO, Dr. Athena Howard. At their meeting he said he told her he never smoked marijuana and she said it's in your system. He informed her of his car ride to the regatta with people that were smoking marijuana. He stated that she said he would have had to smoke a joint to test like this. He denied smoking any marijuana ever.

After his meeting with the MRO, Mr. Watson stated that he phoned Morris Lindsay and told him what happened. Mr. Watson said he told him he knew he was going to be fired and Mr. Lindsay said that is the policy.

Mr. Watson testified that on the day that he was terminated his supervisor informed him of a place to get retested. Grievant said he went there right away and took the test with the results being negative.

Mr. Watson stated that the Company has never had any problem with him concerning absenteeism or productivity and that he has never been disciplined.

Grievant Watson said that he occasionally repairs meters but mostly tests them. He stated that after the meters are taken apart or whatever they need done to them, they are sent to him where he tests them to make sure they run

properly. The meters then go to two different "provers" to inspect them for leakages. His position is primarily concerned with the amount of gas that goes through the meter for billing purposes.

Mr. Watson testified that he has worked in the meter shop for eight years and knows a good deal about meters. There would be no safety problem for the public or his fellow co-workers if he did not repair a meter properly because the meter should be checked twice by the provers.

Mr. Watson stated that he was a customer service man in Huntington, West Virginia for the Company for two years. This position involved him going to customer premises to inspect, repair and change the meters. He stated that he then transferred back to the meter shop because it was closer to his home.

Mr. Watson agreed that his position until his termination was meter repairman A and that testing meters' accuracy is one of his responsibilities. He was tested to receive certification by the Public Service Commission of West Virginia and that is the only position requiring certification. Mr. Watson testified that it would be possible for someone to look at a meter and determine the meter is malfunctioning and/or not reading properly.

Mr. Watson said he had been drug tested on February 7, 1991 and was aware

that if he tested positive he would be discharged. He acknowledged his signature and social security number on the acknowledgement and consent forms dated February 7, 1991 and August 27, 1991. It read as follows:

> I hereby acknowledge receipt of Mountaineer Gas Company's Alcohol and Drug Policy and Procedures. I understand that compliance with it is a term and condition of my employment, or eligibility for employment, and that any violations by me of the policy may result in discipline, up to and including discharge.

Grievant Watson identified the Company's Drug and Alcohol Abuse Policy Section 3.1.3 and read the last line of that section: All positions within the Operations Department are considered safety-sensitive positions. Grievant has not contested the policy until now, although he has disapproved of it. Grievant testified that he did not request a split sample because he did not feel he needed one. He was tested later but it was a different specimen.

Grievant Watson again stated that he is a victim of secondhand marijuana smoke. He was at the regatta on Monday night before his test the following day, Tuesday. He said that he was in a Mazda

626 with four other people that were all smoking marijuana the whole time to the concert and back. The windows were up and the air conditioner was on. He described the amount of smoke in the car as moderate and stated that it did not bother his eyes or nose because he smokes cigarettes and is used to smoke.

Mr. Watson identified the Drug Testing Custody and Control Form, copy five, collector and acknowledged his signature. He stated that he signed a lot of forms that day but doesn't remember receiving a copy. Donald Watson stated that he does not smoke marijuana and if he were to be tested today it would be negative.

William Clay testified that he is employed by the Company and has known Grievant since he started working there, approximately fourteen years. He has worked with Mr. Watson daily and is not aware of him being a problem employee. He testified that Grievant Watson did not appear to be a drug abuser.

Mr. Clay stated that he was familiar with the Drug and Alcohol Abuse Policy and has personally been tested once. He said that he does not socialize with the Grievant outside work but saw him at the regatta working the Company's beer booth. He testified that the Drug and Alcohol Policy has nothing to do with job performance.

Flem Stroud testified that he has known Grievant since 1979 and is the

Union representative, Secretary and Treasurer of the local. He has represented him in the grievance procedure. This is the only time he knows of Mr. Watson needing representation. Mr. Stroud stated that he is familiar with the meter shop and explained its workings. In his opinion it is not necessary for this position to be considered safety-sensitive. He knows of other companies that do not require this position to be safety sensitive and therefore do not have to take random drug screens.

Mr. Stroud said that he has received information from Darrell McCowan of the Public Service Commission concerning the drug testing policy. A letter from George W. Tenley, Jr., Associate Administrator for Pipeline Safety states:

> We consider a vendor who services the equipment it sold to an operator to be a contractor the operator engaged to provide maintenance for that service. Thus, if the service performed by the vendor is done on a pipeline or liquefied natural gas facility and the service is required by CFR Part 192, the person who performs the work is subject to drug testing. However, if the equipment involved is removed from a pipeline or liquefied

> natural gas facility for service by the vendor, the person who performs the service is not subject to drug testing because the equipment would not be part of a pipeline or liquefied natural gas facility when the service is being performed.

Another letter by a Mr. McSweeny concerning the Drug and Alcohol Policy states:

> Part 199 does not prohibit an operator from conducting a drug testing program that exceeds the requirements of Part 199, such as by testing employees not covered by Part 199. However, if an operator conducts such a program, it may not rely on Part 199 as a legal authority for the program.

Mr. Stroud testified that he feels the random testing on the meter repairmen is outside of Part 199 because they are not safety-sensitive positions.

Mr. Stroud stated that he has been secretary-treasurer for about two and a half years. He stated that he wasn't aware that meter repairmen were being submitted to the random drug testing until this case. He has not filed a grievance concerning whether or not meter

repairmen should be included in the safety-sensitive category because this case is pending. In the meantime the members are still being tested.

Mr. Stroud testified that he was not aware of being invited to participate in an arbitration brought about by another local union concerning the drug policy. He has spoken to officers of others locals concerning the policy and provided input but did not actively participate. He stated he was involved in a grievance concerning who should pay for the split sample fee.

Mr. Stroud said that he is basing his position that meter repairmen are not safety-sensitive positions on his experience with the position and the various other drug policies that he's involved with through the other six companies he represents. Mr. Stroud stated that he believes the Company is randomly drug testing people that are not in safety-sensitive positions; this violates 199 and is more stringent than the federal guidelines.

Mr. Stroud agreed that a pipeline is attached to the meter and that it is important that a meter records accurate information but that they are always checked by the customer service people. He said that meter repairmen do serve an important function at the Company by trying to get the meter as accurate as possible.

Norvin E. Hedrick testified that he is the Manager of Operation Services and was the Charleston Division Manager at the time he signed Grievant's suspension and termination letters. He has worked for the Company for thirty-three years. He stated that the meter repairmen are safety-sensitive positions due to their responsibilities for checking leaks and also for being back up to the customer service department. The only position he is aware of requiring certification from the Public Service Commission is the meter repairman.

Mr. Hedrick stated that he does not know how to test meters but is in a safety-sensitive position and is randomly drug tested. He stated that all operations people are subject to the emergency call and therefore considered safety-sensitive and are randomly tested.

The following documents were entered into evidence:

1. The Collective Bargaining Agreement.
2. Step I and II Grievance Forms.
3. Step III Grievance Letter.
4. Company's Drug and Alcohol Abuse Policy.
5. Termination Letter from Company to Grievant.
6. Arbitration Award by James Beilstein.
7. Suspension Letter from Company to Grievant.

8. Company's Drug testing Results Report.
9. Company's Acknowledgement and Consent Forms signed by Grievant on 2/7/91 and 9/27/91.
10. Company's Request/Waiver for Split Sample signed by Grievant.
11. Company's Random Test Information.
12. Letters from Dr. Howard of SSI to Morris Lindsay of Company concerning Grievant's test results.
13. Log kept by Roche Labs.
14. Copy 5 (collector) and 6 (Employer)of Roche Biomedical Laboratories Form 502.
15. Roche Biomedical Laboratories Blank Form 504,Drug Testing and Control Form.
16. Forensic Drug Testing Litigation Support Package.
17. Grievant's Drug Testing File kept by Company.
18. Letter to Flem Stroud of Union from Morris Lindsay of Company regarding arbitration of drug and alcohol policy.
19. CV of Paula Satterly Childs,Ph.D.
20. Grievant's Attendance Records.
21. Grievant's Record of Employment.
22. Grievant's Employee Profile.
23. Letters upgrading Grievant's position and pay.
24. Letter from Public Service Commission of West Virginia to Company containing Grievant's certification card.

25. Company's Payroll Change Reports.
26. Company's Request for Personnel Action terminating Grievant.
27. West Virginia Bureau of Employment Programs' Board of Review Decision.
28. Copies of signed Roche Biomedical Laboratories' Form 502.
29. Arbitration Award issued by tri-parte panel regarding discharge.
30. Drug Screen Consent Form, Drug Screen Test Requisition, and Clinical Laboratory Report signed by Grievant.
31. MRO Manual written by the U.S. Dept.of Health and Human Services.
32. Letters from George W. Tenley, Jr.
33. Twigg vs.Hercules Corp. Decision.

PERTINENT PROVISIONS OF CONTRACT

Article II. Section 2

It is agreed that there shall by no hindrance or interference with the Management of the Company in its several departments, including the determination of the Company policy, which does not interfere with the conditions of this Agreement as affecting wages, hours of work, and working conditions. All rights of Management, except insofar as the same are expressly modified in the terms of this Agreement, are hereby reserved to the Company, and the Company specifically has the power and the right to manage the business and direct the working forces,

including but not limited to, the right to hire, suspend or discharge for proper cause, promote, demote, to transfer employees from one job to another (provided, however, that no employee may permanently transferred from one basic seniority unit to another without his permission), to lay off employees in accordance with seniority, as specified herein, to reduce working hours, to move or to close any departments or other segments of the business because of lack of work or to otherwise generally manage the Company's business. Nothing in this Section shall be construed to supersede or nullify any of the provisions contained in other Articles.

POSITION OF THE PARTIES

SUMMARY OF EMPLOYER'S BRIEF

Mountaineer Gas Company discharged Grievant for proper cause when it terminated his employment on September 19, 1991, for his failure to pass a random drug test.

At the outset of the arbitration hearing, the Union presented the following issues of dispute, specifically:

1. The "randomness" of Mountaineer's random selection program;
2. Whether Grievant's former position of a Meter Repairman A was a safety-

sensitive position, and therefore, subject to the random drug testing program;

3. The integrity of the chain of custody;
4. The accuracy of the test results; and
5. The accuracy of the medical conclusion that Grievant had been a user of marijuana, especially in light of his claim that he tested positive for marijuana due to his passive inhalation of marijuana smoke.

There is no issue over the right of Mountaineer Gas Company under the collective bargaining agreement to implement the Alcohol and Drug Abuse Policy.

Mountaineer responds below to the specific issues of the Union. Further, Mountaineer shall respond to the overall policy issue as to whether it is just cause to terminate an individual for testing positive for an illegal drug, when a company's drug policy requires an employee to request rehabilitation prior to testing, instead of giving the employee an opportunity to seek rehabilitation after he or she tests positive for an illegal drug.

1. The "randomness" of the selection program.

Through the process of the arbitration hearing, this issue is no longer in dispute. The Union represented that it was satisfied that Grievant was selected for random drug testing on August 27, 1991, in a random and appropriate manner.

2. Meter Repairman A as a safety-sensitive position.

Until Grievant tested positive for marijuana and was discharged from employment, he did not contest his inclusion in the safety-sensitive category which subjected him to random drug testing selection. Nor has the Union contested the inclusion of the classification of Meter Repairman A in the safety-sensitive category. As set forth above, Grievant submitted to random drug testing two times. He admitted that as a Meter Repairman A, he was a member of the Operations Department. Further, he admitted that he had knowledge of the terms and conditions of the policy, which at Section 3.1.3 of the policy states that all positions within the Operations Department are considered safety-sensitive positions and subject to random drug testing. In essence, Grievant does not deny that prior to submitting to random drug testing, he had notice that the position of Meter Repairman A was considered safety-sensitive.

Mountaineer submits that Grievant has waived his right to contest the characterization of the Meter Repairman A position as "safety-sensitive," because he submitted to random drug testing two times. Therefore, this issue is not arbitrable.

Even assuming arguendo that the safety-sensitive nature of the Meter Repairman A position was arbitrable, an analysis of the duties and responsibilities of the position substantiates Mountaineer's contention that the position is safety-sensitive. The policy at Section 3.1.3 defines "safety-sensitive positions" as those in which a person performs duties in any of the following functions involving gas facilities: operations, maintenance or emergency-response. Mountaineer submits that Grievant performed both an operations function and an emergency-response function involving gas facilities.

As a Meter Repairman A, he performed an operations function on an appurtenance of the pipeline--the meter. It is unrefuted that a meter's function is to record usage of gas flow. Grievant admitted that it is important that meters are accurate and operating properly when installed and attached to a pipeline. Further, he admitted that a properly functioning meter may be helpful in ascertaining whether there was a gas leak in the line on the customer's premises.

As a Meter Repairman A, Grievant operated a prover, which checks a meter for accuracy. As a prover operator, he was the last person to check the meter for accuracy prior to its installation on a pipeline.

Grievant also testified that he was certified by the West Virginia Public Service Commission as being competent to test meters for accuracy. The person who tests a meter for accuracy is the only position of a gas utility that is required to be certified by the West Virginia Public Service Commission. Grievant acknowledged that the job of a Meter Repairman A is held to high importance by the West Virginia Public Service Commission.

The obvious importance for a meter to operate properly, and the credence bestowed by the West Virginia Public Service Commission on personnel who tests meters for accuracy, substantiates the safety-sensitive nature of the Meter Repairman A position.

As a member of the Operations Department, Grievant performed an emergency-response function on a pipeline, because all members of the Operations Department are subject to emergency call. Further, being a former Customer Service C service person, it was foreseeable that he could and would perform an emergency-response function on a pipeline if the company would

experience a large outage due to an explosion or other intervening causes.

Based upon the foregoing, Mountaineer's policy to include the Meter Repairman A position and Grievant himself, due to his work history, into the safety-sensitive category is reasonable. Until his discharge, Grievant must have agreed that the categorization of his position as safety-sensitive was reasonable also, because he never challenged the categorization and had submitted to two random drug tests without protest. Accordingly, Grievant's objection to the categorization now is without merit.

3. The integrity of the chain of-custody.

The integrity of the chain-of-custody of Grievant's specimen and the test results remain unchallenged. Therefore, Mountaineer will not elaborate on this issue except to state that the chain-of custody and quality control procedures were followed by the collection site, the Roche Biomedical Laboratory and the Medical Review Officer (MRO), as substantiated by the testimony of the collection site phlebotomist and the MRO, the collection site records, the laboratory records and the MRO's records, which were entered into evidence. Although Emilie R. McDevitt, the chemist in the serology department of the Roche

Laboratory who participated in the testing of Grievant's specimen, was present at the hearing in order to testify regarding the integrity of the chain-of-custody and the quality control procedures followed by Roche in testing Grievant's specimen, in the spirit of administrative economy, she did not testify regarding such matters. However, the arbitrator took notice of her anticipated testimony and accepted into evidence in lieu of such testimony that laboratory records she had with her in her custody. During the hearing, Grievant did not challenge or offer any evidence refuting the integrity of the chain-of-custody of his specimen and the test results.

4. The accuracy of the test results.

The accuracy of the test results remain unchallenged, including the confirmatory GC/MS test result of 24 ng/ml. Although Grievant contests the MRO's determination that his positive test result for marijuana was due to his use of marijuana and not passive inhalation of marijuana smoke, the accuracy of the test results was not refuted by Grievant. He offered no medical testimony to challenge the accuracy of the results. Even a non-medical witness of Grievant's, who is the president of a collection site, testified that it is possible that Grievant's

positive drug test result for marijuana is perfectly accurate.

Although Emilie R. McDevitt was present at the hearing to testify regarding the accuracy of the test results, again, in the spirit of administrative economy, she did not testify regarding such matters. However, the arbitrator took notice of her anticipated testimony and accepted into evidence in lieu of such testimony the laboratory records and test results she had with her in her custody.

5. Lack of causation due to passive inhalation.

Grievant claims that he tested positive for marijuana due to passive inhalation of marijuana smoke the night before he submitted to the random drug test. However, the record is void of any medial testimony that supports causation of his positive test results to passive inhalation. To the contrary, the record supports the conclusion that Grievant smoked marijuana.

Further, Dr. Howard testified that based upon research, it was her medical opinion to a reasonable degree of medical certainty that indirect inhalation of marijuana smoke would not result in positive urine drug tests. She stated that the research is confirmed in the Medical Review Officer Manual from the Department of Transportation, the Medical

Review Officer Manual from the American Trucking Association, and also from NIDA,, Health and Human Services Medical Review Officer's Manual.

Dr. Paula Childs, Vice President of Toxicology at CompuChem Laboratories, a subsidiary of Roche Biomedical Laboratories, testified that passive inhalation would cause an individual to test positive above the DOT cutoff levels only in very intense and extreme exposure to marijuana smoke, "...meaning the individual not actively actually smoking or inhaling the drug, to do that several days in a row and to do it with the exposure of many, many marijuana cigarettes, sixteen marijuana cigarettes, in a confined, closed-door type of situation." Dr. Childs further testified that within a reasonable degree of scientific certainty, the description by Grievant of his passive inhalation exposure was not considered intense and extreme exposure to marijuana smoke that would have resulted in a positive test for marijuana.

Dr. Childs further testified that based upon her expert opinion as a toxicologist, an hour and a half of passive exposure would not register a positive test. Dr. Childs testified that she was familiar with the DOT's cutoff levels for the detection of marijuana, and the reason why the cutoff level for marijuana was set by the DOT at fifteen nanograms; per milliliter, was in order

to preclude the argument of passive inhalation of marijuana smoke. At the conclusion of her testimony, Dr. Childs testified that based on the test results, she believed Grievant smoked a marijuana joint, inhaled and smoked it in the normal and customary manner. And she stated that based upon Grievant's test results, that he either smoked marijuana the night before he submitted to the drug test or a few days prior to the test.

The unimpeached medical testimony proffered by Mountaineer at the arbitration hearing overwhelmingly refutes Grievant's claim that he abstained from smoking marijuana. Therefore, as a user of marijuana, who tested positive for the use of such drug, and of equal importance, had notice of the policy and understood that if he tested positive for one of the drugs indicated in Mountaineer's policy, that he would be terminated from employment. Mountaineer discharged Grievant for just cause.

Issue of Just Cause

Mountaineer shall address the overall policy issue as to whether it is just cause to terminate an individual for testing positive for an illegal drug, when Mountaineer's drug policy requires an employee to request rehabilitation prior to testing, instead of giving the employee an opportunity to seek

rehabilitation after he or she tests positive for an illegal drug. Two factors must be addressed in order to resolve this issue, to-wit: (1) whether the content of Mountaineer's Alcohol and Drug Abuse Policy, specifically the discharge penalty with the opportunity for rehabilitation prior to testing and not after testing positive is reasonable; and (2) whether the application of the policy, specifically the discharge penalty, is subject to the grievance and just cause provision of Article II, Section 2 of the contract between Mountaineer and the Union.

1. The content.

Section 2.1.4(b) of Mountaineer's policy states the penalty for testing positive under the Company's random drug testing program is immediate termination from Company employment, lengthy and satisfactory work record and job impairment notwithstanding. The policy provides at Section 3.1.2 that an employee voluntarily may seek rehabilitation paid for through the Company health plan prior to testing one time only, for alcohol or drug abuse under all circumstances, except post-accident testing, without jeopardizing his or her employment with Mountaineer. As stated above, this discharge penalty and rehabilitation provision have been arbitrated and found to be reasonable.

In Mountaineer Gas Company and the Utility Workers Union of America, FMCS No. 91-14090 (January 17, 1992), Arbitrator Beilstein ruled that "given the nature of the Company's business, it is concluded that the Company's policy as written, is not an unreasonable exercise of its management rights." Although this arbitration involved another union, it involved the same policy that is the subject of the present arbitration case. Mountaineer had invited the subject local Union to participate in the arbitration, the Union declined.

In support of its position in FMCS No. 91-14090, Mountaineer stated that the most effective form of drug and alcohol rehabilitation is one which begins with self-identification. The subject policy pressures employees who might not otherwise be so inclined into self-identification and forces them to seek help to cure their problem. The vehicle for this pressure is the threat of loss of employment if the employee uses or abuses alcohol or drugs and is "caught" in a test, lengthy and satisfactory work record job notwithstanding.

Mountaineer further contended, that due to the inherent volatility of natural gas, the policy is reasonable when balancing the interests of the Company, its employees and customers, and the public at large against the interest of an alcohol or illegal drug user. While the employee who fails to self-identify

may feel his termination is a harsh result, a member of the general public or a customer or co-employee who is injured because of the alcohol or drug use of an employee probably would not find the employee's termination nearly so harsh.

Mountaineer's operations include the maintenance and repair of 19.2 million feet of gas distribution pipelines, the inspection on customers' premises of gas appliances and other gas equipment, and the provision of gas service to such customer premises as homes, hospitals, and commercial and industrial businesses. The potentially disastrous consequences which might proximately result from an employee whose judgment is impaired by alcohol or drug use is painfully obvious. Although other companies, policies may allow rehabilitation after testing, the policy here involved is a reasonable one.

The Union argued that an inequity in Mountaineer's policy is that a first time or one time drug user would lose his job. However, Mountaineer's response is that there is a practical solution in order to avoid that risk -- abstain from using illegal drugs.

The Union also argued that an employee might be a "victim" of a testing error, in other words, a false-positive test result. However, the policy includes a "split sample" option in addition to the safeguards provided in the DOT regulations, which are setforth in Section III.

Thus, Arbitrator Beilstein determined that the "content" of Mountaineer's policy, specifically the discharge penalty with the opportunity for rehabilitation prior to testing and not after testing positive is reasonable. Mountaineer has uniformly distributed to its employees and implemented its Alcohol and Drug Abuse Policy company-wide since the policy's inception. Being precedential in nature, Mountaineer also has observed Arbitrator Beilstein's decision company-wide. Therefore, Mountaineer requests the Arbitrator to take notice of Arbitrator Beilstein's decision and to apply it accordingly in this subject arbitration.

Furthermore, it should be interjected that Mountaineer's policy at Section 3.4.1(k) states:

> "k. An employee discharged for a positive test result will be considered by Mountaineer (sic) for re-employment after successful completion of a rehabilitation program at the expense of the discharged employee and submission of proper application forms."

As a caveat, however, re-employment is determinate upon the availability of a position.

A reader of the discharge and rehabilitation provisions of

Mountaineer's policy at first blush may feel the termination provision is unreasonable. However, when read in conjunction with Section 3.4.1(k) of the policy, the termination provision is quite equitable and reasonable. In other words, self-identify your drug or alcohol problem and the Company will pay for your rehabilitation and your employment will not be jeopardized. However, expose the Company, a member of the general public or a customer or coemployee to risk of injury or liability, then you jeopardize your employment and rehabilitation is at your expense.

2. The application.

The application of Mountaineer's Alcohol and Drug Abuse Policy, specifically the discharge provision in the policy, is subject to the grievance procedure and the proper cause provision of Article II, Section 2 of the collective bargaining agreement. Arbitrator Beilstein stated in his decision (supra) that a termination based upon a positive test for drugs is subject to the employee's rights under the grievance procedure.

Mountaineer submits that the discharge penalty in the drug policy has not prohibited Grievant from exercising his rights under the collective bargaining agreement. He has presented five (5) issues in this arbitration in

order to contest Mountaineer's position that he was terminated from employment for proper cause.

As Arbitrator Beilstein concluded in FMCS No. 91-14090 (supra) , the opportunity for rehabilitation after testing positive is not a factor to consider in determining whether a termination from employment was for proper cause, because he stated that "all employees are on notice that a positive-test for drugs will, under the terms of the Policy, result in termination..." It is unrefuted and admitted by Grievant that prior to submission to the drug test, he had knowledge of the terms of the policy and notice that if he tested positive for one of the drugs indicated in Mountaineer's policy, that he would be terminated from employment. Therefore, an analysis as to whether he was terminated for proper cause should not include consideration as to his lack of rehabilitation opportunity after testing positive for an illegal drug, his length of employment, his work record, or his lack of job impairment, but rather the underlying factors of the discharge should be examined, such as whether the procedures setforth in the policy were followed and whether the drug test results were accurate. These kind of underlying factors are what Grievant has challenged in this arbitration proceeding, not the provisions of the policy itself.

This same reasoning was applied in Appalachian Power Company and International Brotherhood of Electrical Workers, FMCS No. 92-17798 (May 5, 1993), in which Arbitrator Joseph ruled that the Grievant had been discharged for proper cause for testing positive for an illegal drug. The employer's policy mirrors Mountaineer's policy, in that it provides for immediate termination from Company employment after testing positive for drugs, lengthy and satisfactory work record, and job impairment notwithstanding. As in the subject case, there was no job impairment. Further, one important distinction between the employer's policy and Mountaineer's policy is that it does not provide for rehabilitation whatsoever.

In his analysis of a proper cause termination, Arbitrator Joseph considered the underlying factors of the discharge, such as whether the employee had notice of the policy and his rights thereunder. The employee's lack of rehabilitation opportunity, the employee's length of employment, his work record, and lack of job impairment were appropriately not considered by Arbitrator Joseph in his "proper cause" analysis.

In conclusion, as the foregoing demonstrates, the discharge provision of Mountaineer's Alcohol and Drug Abuse Policy has not prohibited the exercise of Grievant's rights under the grievance procedure and the proper cause provision

of Article II, Section 2 of the collective bargaining agreement. He has exercised those rights.

Grievant was discharged for proper cause. As a Meter Repairman A, Grievant's former position was properly categorized as a "safety-sensitive" position and therefore, subject to random drug testing. He was properly selected for testing from the random pool. His positive test results for marijuana were accurate and the chain-of-custody of his specimen was integral and complete. The unimpeached medical testimony refutes Grievant's claim that he tested positive for marijuana due to passive inhalation of marijuana smoke the night before he submitted to the random drug test. All of the procedures setforth in Mountaineer's Alcohol and Drug Abuse Policy were followed. Grievant had knowledge of the provisions of the policy and had notice prior to submitting to the drug test that if he tested positive for one of the drugs indicated in the policy, including marijuana, that he would be terminated from employment; and lack of rehabilitation opportunity after testing positive for an illegal drug, length of employment, work performance, lack of Job impairment notwithstanding. Accordingly, the underlying factors of the termination do not negate Grievant's discharge. Therefore, Mountaineer hereby requests that his discharge be upheld and the grievance denied.

SUMMARY OF UNION'S BRIEF

1. Did the Company have the right to unilaterally implement the mandatory random drug testing for all employees within the operations department and/or was it contrary to public policy in West Virginia for the company to require an employee to submit to a random drug testing, since such drug testing portends an invasion of an individual's right to privacy?

The Supreme Court of Appeals of West Virginia in Twig v. Hercules Corporation, 406 S.E.2d 52, held that: (1) It is contrary to public policy for private employer to require employee to submit to drug testing, and (2) drug testing by private employer will not violate public policy grounded in potential intrusion of persons right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of employees drug usage or while employees, job responsibility involved public safety or safety of others. The company has admitted that the drug test in question was mandatory and that it was random, therefore, it was not based upon reasonable good faith objective suspicion of Grievant's drug usage but that Grievant's job responsibility involves public safety or safety of others. The Court in Twig stated that "there must be

a showing by the employer that the employees required to undergo such testing have responsibilities or duties which are connected to the safety concerns of others." The job responsibilities of Grievant did not involve either the safety of others or public safety.

Grievant testified as to the duties of a Meter Repairman A. Those duties consist of the rebuilding of gas meters for accuracy. Accuracy is not safety. His testimony was supported by that of a co-worker, Mr. Bill Clay. Their testimony was uncontroverted. The duties of a Meter Repairman A consisted of rebuilding gas meters, for the purposes of accuracy, i.e., the measurement of the amount of natural gas flowing through the meter.

Both Grievant and Mr. Clay testified that two (2) tests are completed by other employees on the rebuilt meters for any possible leaks. One test is done in the shop to determine if there are any leaks. This test is not done by the individual Meter Repairman A that rebuilt the meter. If the meter doesn't have any leaks, it is then sent to the field for installation. Once the meter is installed in the field, the installer again performs a test on the meter to determine if there are any leaks. The Meter Repairman A doesn't leave the shop to work on gas lines or any part of the distribution of natural gas. Their

duties consist solely of rebuilding the measuring mechanisms of the meter.

However, the Company testimony indicates that these Meter Repairman A may be called into the field in cases of an emergency. Since no testimony or evidence was submitted by the Company to support the necessity of such a transfer, it is necessary to point out that Meter Repairmen A are not qualified to work on gas lines in the field. This sort of transfer would in and of itself create an unsafe condition due to their lack of qualifications. Furthermore, the Company produced no evidence to indicate that Meter Repairmen A have ever been or will ever be used in the field. Therefore, the alleged transfer of Meter Repairmen A from the shop to the field is a mere pretext so the Company can mandate testing of as many employees as it desires and is not rationally based in the concern for the safety of employees or others.

Also, the testimony of Mr. Flem Stroud, which was uncontroverted, indicated that the Company has in the past and continues to send out gas meters to various other companies to be rebuilt. Mr. Stroud further testified that the Meter Repairmen employed by the various companies contracting the work to rebuild the meters are not subject to mandatory random drug testing. Mr. Stroud further testified that these meters are not

tested in the companies meter shop before they are placed into the field.

Mr. Stroud, as an employee and a Union representative, kept records in the usual course of his business as a Union representative - two (2) of which were admitted into evidence at this hearing. The first letter was received by Mr. Stroud from the West Virginia Public Service Commission dated May 3, 1993. This was a letter from the United States Department of Transportation to Long Island Lighting Company from Mr. George W. Tenley, Jr., Assistant Administrator for Pipeline Safety. The second letter was from Mr. George W. Tenley, Jr., to the National Fuel Gas Distribution Corporation. Both of these documents and the testimony of Mr. Flem Stroud remove any doubt and clearly indicate that Meter Repairmen A should not be subjected to mandatory random drug testing since their positions do not involve the safety of employees or others.

Henceforth, the mandatory drug testing of Meter Repairmen A constitutes an invasion of an individual's right to privacy pursuant to the court's holding in Twig and therefore contravenes a substantial public policy in the State of West Virginia.

Mandatory random drug testing of Meter Repairmen A must cease immediately and Grievant should be reinstated with full back pay, benefits, seniority and

this action expunged from his employment record.

2. Does insufficient chain of custody or violation of Federal Regulations render test results invalid?

On August 27, 1991, Grievant was instructed to appear and was transported by the Company to Shared Services, Inc., the collection site and was subjected to another mandatory random drug test. Grievant presented himself and provided Shared Services, Inc., with a urine specimen. Shared Services, Inc., through their agent and/or employee is required to have the applicant sign Copy 3 of the Form 502. This form was admitted into evidence, and beyond any doubt - no signature appears on Copy 3.

The missing signature was admittedly a mistake, by testimony of Tondra Bates, the person responsible for collecting the specimen. Also, Section 8 on Form 502, which is required to be completed by the person collecting the specimen, is not to be filled out until Section 7 of Copy 3 has been filled out by the donor. Not only did Tondra Bates error in making certain as to which copy was signed by the donor, she proceeded to complete Section 8 while the appropriate Section 7, page 3 was not signed and certified that page 3, Section 7 was completed.

To further complicate this matter, Grievant testified that the specimen was

not sealed in his presence, however, this testimony was contradicted by the testimony of Tondra Bates. The credibility of her testimony is clearly an issue since she had already made two mistakes - in processing, which clearly indicates the haphazard approach taken by her as it relates to the duties as the specimen collector.

Furthermore, Section 7 of Copy 1 of Form 502 states that "Federal Regulations prohibit disclosure of donor's identity to the laboratory." The significance of this is tantamount to the negligence of Tondra Bates and the collection site. The laboratory had the identity of Grievant, the donor. This is clearly reflected by the handwritten records of Dr. Athena Howard, the MRO.

Dr. Howard, on September 11, 1991, at 10:15 a.m. wrote the following:

> "It has become evident that the Roche Bio Medical Lab, Inc., drug testing control form retained by SSI Physical does not include the employee's signature. The copy retained by Mountaineer Gas and by Roche does include the proper signature. Dr. Howard's signature appears to verify her findings and that Roche Laboratory did have the form on which Grievant's signature

appeared, thereby disclosing his identity."

The MRO and the Company were aware of these discrepancies but chose to proceed with the discharge of Grievant, thereby violating Federal Regulations. Therefore, the test results should be rendered invalid and Grievant should be reinstated with full back pay, benefits, seniority and this action expunged from his employment record.

3. Does a drug screen showing positive for marijuana justify the discharge of a fifteen year employee, with an unblemished employment record, when prior and subsequent drug testing indicated negative results and/or is this violative of the intent and purpose of any Employees Assistants Programs (EAP)?

An employer should consider an employee's entire work history to determine the existence of mitigating circumstances that would justify leniency. The Company in this case has failed to consider any mitigating circumstances and imposed industrial capital punishment on a loyal, hardworking, fifteen year employee. All of the evidence indicates Grievant should be exhonorated, or in the alternative, he should be afforded some leniency.

Leniency should have been afforded Grievant since he tested negative in

February, tested negative in September and considering all of the discrepancies with his August 27, 1991, testing.

The Company has by its own Alcohol and Drug Abuse Policy/Procedure indicated their intent to establish an Employee Assistance Program (EAP). According to paragraph 2.1.3 on page 1 of 6, the Company committed itself:

> "To an alcohol and drug free work environment consisting of three elements: eradication of any alcohol or drug use which may imperil employees or the publics well being or safety; assistance and support for employees who voluntarily submit to alcohol or drug abuse treatment; and firmness in dealing with employees found to be abusing alcohol or drugs. As a reflection of its commitment, the Company has implemented an Employee Assistance Program (EAP) that includes counseling for alcohol or drug problems for all employees and their eligible family members ..."

By their own policy declaration, the Company committed itself to helping all employees, not just those who ask for help prior to testing. In order for an employee to request assistance from the

EAP or the Company, it is necessary for the employee to recognize their problem with alcohol or drugs. Certainly, the Company did not recognize that Grievant may have had a problem, assuming arguendo - he did.

Furthermore, paragraph 2.1.2 of the Alcohol and Drug Abuse Policy states:

> "There is considerable evidence showing that employees who abuse alcohol or use illegal drugs are less productive, less reliable and are absent more frequently than their fellow employees, resulting in increased costs and risks for the company. There is additional evidence that shows job performance impairment can result from use or abuse of certain prescribed drugs."

Grievant did not exhibit any of these signals. Therefore, we must assume Grievant didn't have a problem.

However, the test of August 27, 1991, showed positive for marijuana. Grievant offered the only plausible explanation he had for such a result. This did not satisfy the Company. Grievant was going to be their example. Grievant was fired.

A problem did exist. Was that problem all of Grievant's? The answer to that question is "No." Paragraph 2.2.1 of

the same policy places responsibility on the immediate supervisors for identifying employees that appear to have alcohol or drug problems and for taking corrective action. Was the immediate supervisor discharged for failing in his responsibility? No, he wasn't. Or in the alternative, was anything recognizable to anyone, including Grievant? Obviously, this was not the case. If Grievant had a problem, no one was aware of it - not even Grievant.

The more appropriate action by the Company would have been to show its commitment to the EAP and encourage Grievant to explore this as an alternative. This would have accomplished a number of positive goals for both the Company and the Union. This would show employees of the Company's commitment and loyalty to them and would, have probably been met with a more positive attitude, more loyalty and certainly more commitment to the Company from the employees.

However, when presented with the choice of using "the carrot or the stick" - the Company chose the stick. "And stick to their guns" they did. Grievant has been out of their employ for nearly two years.

Was the Company committed to helping employees with any problem they had? Answer, No.

Was the Company willing to allow Grievant into the EAP? Answer, No.

Was the one test of August 27, 1991, sufficient to justify the discharge of Grievant? Answer, No.

Was or is Grievant, the problem? Answer, No.

This Company has continued to repeat the same mistakes as many other companies throughout labor history, i.e., rule with an "iron fist" and "beat the employees into submission." This clearly flies in the fact of logic and clearly defeats the purpose of establishing any Employee Assistance Program.

A relevant case was submitted into evidence, by the Grievant, at the Arbitration of this matter. To cite case law further for this Arbitrator, I believe is unnecessary, he is well aware of the cases where arbitrators have upheld discharge, where arbitrators have reduced the penalty, and where arbitrators permitted no penalty. However, pages 200 through 201 of How Arbitration Works, Elkouri and Elkouri, Fourth Addition Cumulative Supp. (1991), verifies the numerous cases mentioned above.

Mandatory random drug testing is a violation of a substantial public policy in West Virginia unless the employees subjected to the testing have responsibilities or duties which are connected to the safety concerns of others. The job responsibilities of Grievant did not involve the safety of others. Therefore, it was an invasion of

privacy to subject Grievant to the testing and the results should be expunged from his record.

The Federal Regulations clearly show that Roche, Inc., should not have been given the identity of the specimen donor. Dr. Athena Howard admits that Roche had the signature of Grievant, and therefore, his identity was disclosed to the laboratory. This alone should render the results invalid. Furthermore, the negligence of Tondra Bates further supports the contention to invalidate the results.

Lastly, the Company has implemented an EAP and has made it impossible for an employee to avail himself to the benefits of the program unless they do so prior to testing. If any employee has a drug problem, the EAP should be available at any time for the employee. This includes the period of time after the test results are in. The test results of August 27, 1991, do not in any way indicate that Grievant has a drug problem and he should be reinstated to employment, granted back pay, benefits and seniority, and this action should be expunged from his record.

ISSUE:

Was Grievant Donald Watson discharged for just cause?

If not, what shall be the remedy?

ANALYSIS AND FINDINGS

The Arbitrator declines the Union's invitation to hold that the position of Meter Repairman A is not one of a safety-sensitive nature. Testimony has shown the extensive requirements of this position and the importance of this position with regards to the Company's effectiveness as a business and the emergency response function of this department. The fact that the West Virginia Public Service Commission requires this position to be certified further supports the Company's claim. Therefore, the Arbitrator does not sustain the Grievance based upon the Union's claim that the Company did not have the right to implement the mandatory random drug testing policy for employees in the Operations Department.

The Arbitrator disagrees with the Union that there was an insufficient chain of custody to render the test results invalid. The Union relying heavily on the fact that one form missing Grievant's signature renders the test invalid in unpersuasive for the Arbitrator. The Union did not prove that there was a significant aspect of the procedure missing to invalidate the test. Noting the Union's claim that the Roche Biomedical Laboratories did have the identity of the donor which is in violation of Federal Regulations, the Arbitrator does not find that on this

issue alone the test results should be invalidated. The Union's further claim that the test was erroneous due to Grievant's not witnessing the sealing of his specimen in his presence is also unconvincing.

The Arbitrator does, however, agree with the Union that Grievant's unblemished work history over 15 years of employment with the Company, the Arbitrator finds that there was not just cause for his termination. The Arbitrator rejects the Policy as applied here and finds that just cause for immediate termination did not exist under these circumstances.

Employers implement Employee Assistance Programs in order to rehabilitate and retain valuable employees with personal problems. Substance abuse is always a key element of any properly implemented EAP. Often it takes being "caught" or the threat of discharge or discipline, for employees to seek professional help. Grievant's inability to utilize this program after testing positive undermines the purpose and effectiveness of the EAP.

The Arbitrator has great difficulty with a substance abuse policy that permits rehabilitation for voluntary assistance but terminates without recourse anyone who is "caught" by a positive drug test. Since the Company Policy was upheld by Arbitrator Beilstein, revision or invalidation of

the Policy on its face is improper since the matter is res Judicata. Although Arbitrator Beilstein upheld the Policy on its face that does not mean that there are not individual exceptions to the strict application of the Policy. Laws and policies upheld on their face can always be challenged in their application. The Arbitrator agrees with the Union that leniency should have been afforded Grievant since he tested negative in February and September and showed no signs whatsoever of poor or adverse job performance.

Grievant Watson, however, must be subject to serious discipline and enter the Employee Assistance Program in order to impress upon him the potential consequences of his personal misconduct. The Arbitrator will conditionally reinstate Grievant but without backpay. Grievant's time-off will be converted into a disciplinary suspension. As a condition of Grievant's continued employment, the Company may test Grievant for illegal substances at any time during his employment relationship. If Grievant refuses a test, or tests positive, he shall be immediately terminated for violating the threshold condition of his reinstatement.

AWARD

The Arbitrator grants the Grievance in part and denies it in part. Grievant

must enter the Employees Assistance Program and take a drug test before returning to work. Grievant shall receive no back pay and his discharge shall be converted into a disciplinary suspension. The Employer may drug test Grievant at their sole discretion. The Grievant may be terminated for testing positive and/or refusing to be tested. Pursuant to the request of the parties, the Arbitrator retains jurisdiction over the implementation of this Award.

It is hereby so Ordered this 25th day of August, 1993.

/s/ Robert A. Creo
ROBERT A. CREO, ESQUIRE
Arbitrator

Pittsburgh, Pennsylvania

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Entered February 27, 1995

MOUNTAINEER GAS COMPANY,
a corporation,

Plaintiff

v.

OIL, CHEMICAL & ATOMIC
WORKERS INTERNATIONAL UNION;
OIL,, CHEMICAL & ATOMIC WORKERS
INTERNATIONAL UNION, LOCAL 3-372;
and DONALD R. WATSON,

Defendants

Civil Action No. 2:93-0862

MEMORANDUM ORDER

This matter is before the court on Mountaineer Gas Company's motion for summary judgment. Mountaineer seeks vacation of an arbitration award. Defendants Oil, Chemical & Atomic Workers International Union; Oil, Chemical & Atomic Workers International Union, Local 3-372 (hereinafter, collectively, OCAW); and Donald R. Watson oppose vacation of the award and seek to have it confirmed and enforced.

I. Background

The following facts are not in dispute.

Mountaineer, OCAW and Donald Watson, as a member of OCAW, are parties to a collective bargaining agreement, which reserves to Mountaineer the following rights:

> It is agreed that there shall be no hindrance or interference with the Management of the Company in its several departments, including the determination of Company policy, which does not interfere with the conditions of this Agreement as affecting wages, hours of work, and working conditions. All rights of Management, except insofar as the same are expressly modified in the terms of this Agreement, are hereby reserved to the Company, and the Company specifically has the power and the right to manage the business and direct the working forces, including but not limited to, the right to hire, suspend or discharge for proper cause . . . .

(Joint Ex. I at Art. II, § 2.) The agreement also contains an arbitration provision which states that the arbitrator shall limit his decision to

the issue submitted by the parties and "shall have no authority to amend, add to, or subtract from this Agreement." (Id. at Art. XXVII, § 3.)

Mountaineer is a public utility engaged in the transportation and supply of natural gas in West Virginia. It is covered by various state and federal laws relating to the safe operations of its pipelines and equipment, including the federal 1988 Drug Free Work Place Act, 41 U.S.C. §§ 701-707,[1] (Joint Stip. at ¶1), and Department of Transportation (DOT) Pipelines Regulations,[2] 49 C.F.R., Part

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[1] The 1988 Drug Free Workplace Act applies to federal contractors and federal grant recipients. The Act requires, inter alia, (A) the publishing of a statement notifying employees that possession or use of a controlled substance in the workplace is prohibited and specifying the actions that will be taken for violation of such prohibition and (B) the establishment of a drug-free awareness program which informs employees of the dangers of drug abuse in the workplace, the policy of maintaining a drug-free workplace, the availability of drug counseling and rehabilitation assistance programs and the penalties that may be imposed for drug abuse violations. 41 U.S.C. § 701(a) (contractors); 41 U.S.C. § 702(a) (grant recipients).

[2] The DOT Pipeline Regulations require certain operators of pipeline facilities, by April 20, 1990, to test employees for the presence of prohibited drugs and to provide an employee assistance program. 49 C.F.R. § 199.1. The testing program must require pre-employment testing, post-accident testing, random testing, testing based on reasonable cause and return to duty testing. §199.11. Operators may not

199, (Pl.'s Attach. A, Anderson Aff. ¶2). In order to comply with the DOT regulations and other applicable laws, (Anderson Aff. ¶3), Mountaineer instituted an alcohol and drug abuse policy on April 20, 1990. The policy was put into effect in February 1991.

The substance abuse program developed under the policy emphasizes: "eradication of any alcohol or drug abuse which may imperil employees' or the public's well-being or safety; assistance and support for employees who voluntarily seek alcohol or drug abuse treatment; and firmness in dealing with employees found to be abusing alcohol or drugs." (Joint Ex. 2 at 2.1.3.) The policy states that Mountaineer will conduct testing of employees to help detect abuse and that Mountaineer "shall," when the tests reveal drug abuse, "immediate[ly] terminate[]" the employee from company employment.[3] (Id. at 2.1.4.) The policy

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knowingly use an employee who fails or refuses to take a required test. § 199.9. However, operators, in their discretion, may provide that the employee assistance program "include an opportunity for employee rehabilitation." §199.19(a).

[3] The penalty provision of the policy, 2.1.4, states in full:

While the company will strive to maintain an alcohol and drug-free work environment, it is foreseeable there will be instances when employees abuse these substances. The company will conduct testing of employees as is appropriate and necessary to help detect such abuse. The company shall take the following

includes implementation of an employee assistance program and provides:

> All employees voluntarily may seek rehabilitation prior to testing, one time only, for alcohol or drug abuse under all circumstances except post-accident testing . . . without jeopardizing their employment with [Mountaineer]. "Prior to testing" is defined as the period of time during which the employee has been selected for testing but has not yet submitted his or her urine specimen.

(Id. at 3.1.2) (emphasis in original).

Under the policy, urine specimen drug testing is required on a random basis for "[a]ny employee in a safety-sensitive position." (Id. at 3.3.1a.) "All positions within the Operations Department are considered safety-sensitive positions." (Id. at 3.1.3) (emphasis in original). An employee testing positive for drug abuse can

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action when the tests reveal persons have been abusing alcohol or drugs:

> a. Alcohol--disciplinary action up to and including discharge from company employment.
> b. Drugs--immediate termination from company employment.

request re-analysis. (Id. at 3.4.1h.) However, "[n]otwithstanding the re-analysis option in subsection h, if an employee does test positive for drugs and there is no legitimate medical reason for the positive result, the employee will be promptly discharged," subject to reinstatement "if the original analysis is then found to be incorrect." (Id. at 3.4.1i.)

The substance abuse policy was distributed to all employees prior to its implementation on February 1, 1991. The Utility Workers Union of America, which represented Mountaineer's employees in the Wheeling area, responded to implementation of the policy by filing a grievance on February 1, 1991.[4] The Utility Workers' grievance challenged Mountaineer's right under the collective bargaining agreement to unilaterally impose the policy inasmuch as it contained provisions in excess of those required by the DOT's regulations governing drug testing for operators of pipeline facilities.[5] (Pl.'s Attach. B at

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[4] At an earlier time, the Utility Workers filed an unfair labor practice charge aimed at Mountaineer's failure to negotiate with them regarding the substance abuse policy. The National ' Labor Relations Board deferred the charge to arbitration under the collective bargaining agreement, but the Utility Workers did not pursue arbitration.

[5] The collective bargaining agreement with the Utility Workers similarly reserved to

2.) In pertinent part, the Utility Workers contended that the regulations did not require termination of employment for violation of the company's drug policy by failing or refusing to take a drug test but rather permitted less severe forms of discipline, including a rehabilitation opportunity. (Id. at 3-4.)

The Utility Workers' grievance proceeded to binding arbitration before Arbitrator James R. Beilstein. At the arbitration step, it was agreed that Mountaineer had the right to implement the policy, subject to the grievance process, but the Utility Workers continued to challenge the reasonableness of the policy's penalty provision for a positive drug test. (Id. at 8-9.) On January 27, 1992, Arbitrator Beilstein entered his award. He concluded that, given the nature of Mountaineer's business, the policy and its provision for immediate termination, without the opportunity for rehabilitation, on testing positive for drugs, was not an unreasonable exercise of Mountaineer's management rights. (Id. at 9.) The Utility Workers' grievance was accordingly denied. (Id. at 10.)

Watson, who stipulates that he received a copy of the substance abuse policy, started working for Mountaineer's predecessor in March 1976. In 1991, he was employed by Mountaineer as a meter

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Mountaineer the right to discharge for proper cause."(Pl.'s Attach. B at 3.)

repairman A in the operations department, a safety-sensitive position within the policy's definition of that term. He accordingly was subject to random drug testing. His first test on February 7, 1991, was negative. He was randomly tested again on August 27, 1991, with the result confirmed positive for the presence of metabolites of marijuana. Pending confirmation of the positive test result, he was placed on suspension on September 10, 1991. A third test, conducted on September 10, 1991, yielded a negative result. By letter dated September 19, 1991, he was terminated effective that date, pursuant to Mountaineer's substance abuse policy, "for failure to pass a random drug test." (Joint Ex. 3.) It is contended by Mountaineer, and not disputed by OCAW, that it has unfailingly terminated all employees who have failed to pass a required drug test.

Watson filed a grievance challenging his discharge. The grievance was not resolved informally and proceeded to binding arbitration before Arbitrator Robert Creo. The issues, as framed in Arbitrator Creo's award were: "Was Grievant Donald Watson discharged for just cause?" "If not, what shall be the remedy?" (Id. at 42.) The pertinent portion of the collective bargaining agreement was identified as Article II, Section 2, which reserved to Mountaineer the right to determine company policy and

the right to "suspend or discharge for proper cause." (Id. at 25.) In addition, the award references sections 2.1.4 and 3.4.1 of Mountaineer's substance abuse policy, both of which state the company's position that positive drug tests will result in "immediate termination," 2.1.4, or "prompt discharge," 3.4.1.

After summarizing the testimony adduced at a hearing held on May 4, 1993, and the positions of the parties, Arbitrator Creo found that Watson's position was "safety-sensitive" and that it was appropriate to require his participation in the random drug testing program. (Id. at 42.) He also rejected arguments by OCAW challenging the validity of the positive test result.[6] Nonetheless, he went on to say:

> The Arbitrator does, however, agree with the Union that (in view of] Grievant's unblemished work history over 15 years of employment with the Company, the Arbitrator finds that there was not just cause for his termination. The

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[6] OCAW challenged the validity of the test result on the ground that there was a break in the chain-of custody of the test sample. Prior to the arbitrator's issuance of his award, Watson and OCAW apparently abandoned the argument that the positive test result was occasioned by secondary inhalation the night before' while Watson was in a car with friends who were smoking marijuana.

Arbitrator rejects the Policy as applied here and finds that just cause for immediate termination did not exist under these circumstances.

Employers implement Employee Assistance Programs in order to rehabilitate and retain valuable employees with personal problems. Substance abuse is always a key element of any properly implemented EAP. Often it takes being "caught" or the threat of discharge or discipline, for employees to seek professional help. Grievant's inability to utilize this program after testing positive undermines the purpose and effectiveness of the EAP.

The Arbitrator has great difficulty with a substance abuse policy that permits rehabilitation for voluntary assistance but terminates without recourse anyone who is "caught" by a positive drug test. Since the Company Policy was upheld by Arbitrator Beilstein, revision or invalidation of the Policy on its face is improper since the matter is res judicata. Although Arbitrator Beilstein upheld the Policy on its face that does

> not mean that there are not individual exceptions to the strict application of the Policy. Laws and policies upheld on their face can always be challenged in their application. The Arbitrator agrees with the Union that leniency should have been afforded Grievant since he tested negative in February and September and showed no signs whatsoever of poor or adverse job performance.

(Id. at 43.)

Arbitrator Creo accordingly directed that Watson enter the employee assistance program "in order to impress upon him the potential consequences of his personal conduct" and that he take a drug test before returning to work. (Id. at 44.) Watson was conditionally reinstated without back pay and his discharge was converted into a disciplinary suspension. As conditions of his reinstatement, Watson was required to submit to further drug testing at Mountaineer's sole discretion and was subject to immediate termination for testing positive or refusing a test. (Id.)

Arbitrator Creo's award was entered on August 25, 1993. Mountaineer filed this action to vacate the award on September 10, 1993.

In its motion for summary judgment, Mountaineer seeks vacation of the award on the grounds that the award is contrary to public policy and that it fails to draw its essence from the parties' collective bargaining agreement.

II. Discussion

Under the United States Supreme Court's Steelworkers Trilogy, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960), it is well established that judicial review of labor arbitration awards under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is extremely limited. In restricting judicial review, the Supreme Court has emphasized:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because

> their interpretation of the contract is different from his.

Enterprise Wheel, 363 U.S. at 599. Courts accordingly are not to usurp the function of the arbitrator by reviewing the merits of an arbitration award even though it may rest on a misreading of the contract, for it is the arbitrator's view of the meaning of the contract that the parties agreed to accept. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36-38 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id. at 38.

Nonetheless, the arbitrator "may not ignore the plain language of the contract." Id. Rather, an arbitrator's discretion is subject to the limitation that his award "draw[] its, essence from the collective bargaining agreement." Enterprise Wheel, 363 U.S. at 597. As the Supreme Court more fully explained:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources; yet his award is

> legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id.

An award fails to draw its essence from the collective bargaining agreement "[o]nly if the arbitrator must have based his award on his own personal notions of right and wrong," in the sense that the award is not based on a plausible reading of the agreement, Upshur Coals Corp. v. UMWA, Dist. 31, 933 F.2d 225, 229-30 (4th Cir. 1991) (citing E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 614 (7th Cir.), Cert. denied, 479 U.S. 853 (1986)), or is otherwise not "rationally inferable" or "in some logical way" derived from the collective bargaining agreement, Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403, 412 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1970). Similarly, an award does not draw its essence from the collective bargaining agreement if it ignores the plain language of the contract, Misco, 484 U.S. at 38, or conflicts with its express terms, Vic Wertz Distrib. Co. v. Teamsters Local 1038, Nat'l Conf. of Brewery Workers, 898 F.2d 1136, 1141-43

(6th Cir. 1990). Thus, "[i]f the language of an agreement is clear and unequivocal, an arbitrator, cannot give it a meaning other than that expressed by the agreement." Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940, 944 (1st Cir. 1988).

In determining whether an award draws its essence from the collective bargaining agreement, it is also appropriate to consider whether the arbitrator exceeded his contractual authority for it is recognized that the parties' agreement to arbitrate their disputes may also limit the arbitrator's discretion. Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599, 602 (5th Cir. 1989), cert. denied, 498 U.S. 853 (1990); see Monongahela Power Co. v. Local No. 2332, Int'l Bhd. of Elec. Workers, 566 F.2d 1196, 1198-1200 (4th Cir. 1976). Consequently, when the collective bargaining agreement provides that disciplinary rights are reserved exclusively to management and specifies the conduct that will warrant discharge, the arbitrator may not infringe on those rights by modifying the discipline imposed. Warrior & Gulf Navigation Co. v. United Steelworkers of America, 996 F.2d 279 (11th Cir. 1993), cert. denied, 114 S. Ct. 1834 (1994) (where agreement provides for immediate discharge of employee who tests positive for drugs a second time, arbitrator, on finding that

second positive test was legitimate, may not reduce penalty to disciplinary suspension); Delta Queen, 889 F.2d 599 (where agreement reserves to management the sole responsibility to discipline and discharge for proper cause, such as carelessness, and the arbitrator finds "grossly careless" conduct by discharged employee, the arbitrator may not award reinstatement notwithstanding his belief that discharge was unfair in light of the employee's "forty years of untarnished" service); Georgia Pacific, 864 F.2d at 944-46 (where agreement provides for immediate discharge for dishonesty and arbitrator makes factual finding of dishonesty, he may not award reinstatement on the reasoning that employee's years of faithful performance constitute a "countervailing factor" entitling him to at least one opportunity to correct his ways before being discharged); S.D. Warren Co. v. United Paperworkers Int'l Union, 845 F.2d 3, 7-8 (1st Cir.), cert. denied, 488 U.S. 992 (1988), on remand after vacation of 815 F.2d 178 (1st Cir. 1987), vacated 108 S. Ct. 497 (1987) (where agreement reserves to management the sole right to discharge for cause and negotiated rules provide that possession of drugs on company property is cause for discharge, arbitrator, on finding involvement with drugs, may not change penalty to suspension because of "extenuating circumstances"); Monongahela Power, 566 F.2d 1196 (where company

retains "unqualified right" to discharge or discipline employees who violate the agreement and arbitrator finds that the agreement was violated, he has no authority to alter the penalties imposed by the company).

In those instances where the collective bargaining agreement does not specify the conduct that constitutes cause for discharge, arbitrators may look to other sources for guidance'. Among the sources deemed to be an integral part of the agreement are "custom and practice" or "the common law of the shop," which includes management's work rules and disciplinary enforcement policies and practices. Norfolk Shipbuilding & Drydock Corp. v. Local No. 684, Int'l Bhd. of Boilermakers, 671 F.2d 797, 799-800 (4th Cir. 1982); see also Brigham & Women's Hosp. v. Massachusetts Nurses Assoc., 684 F. Supp. 1120, 1123-24 (D. Mass. 1988) (where agreement gave employer right to discharge for "just cause," arbitrator properly looked to hospital's disciplinary policy to determine meaning of the term). Indeed, it is held that where the collective bargaining agreement reserves to management the right to make and enforce disciplinary rules, rules promulgated pursuant to that authority are thus incorporated into the agreement and have "the force of contract language." General Drivers, Warehousemen & Helpers Local Union 968 v. Sysco Food Services, Inc.,

838 F.2d 794, 796, 799 & nn.1 & 4 (5th Cir. 1988). Consequently, where the agreement reserves to management the right to establish rules and policy and the right to suspend or discharge for cause and further provides that an arbitrator shall not have the power to add to, subtract from, or modify the agreement, an arbitrator, on finding a violation of the rule, may not modify a penalty mandated by the rule and consistently applied because he is convinced that extenuating circumstances justify a less severe penalty. Contico Int'l, Inc. v. Local 160, Leather Goods, Plastics & Novelty Workers, 738 F. Supp. 1262 (E.D. Mo. 1990) (where arbitrator found that employee violated work rule against sleeping on the job and violation of rule required automatic termination, arbitrator's determination that penalty of discharge was excessive did not draw its essence from the collective bargaining agreement and could not be enforced); see also Sysco Food, 838 F.2d at 799 (where arbitrator found that work rule was not violated, he was free to set aside penalty of discharge; however, a finding of violation of the rule would have precluded further inquiry as to the appropriateness of the rule's required punishment); Bechtel Constructors Corp. v. Detroit Carpenters Dist. Council, 610 F. Supp. 1550 (E.D. Mich. 1985) (where arbitrator found that employee violated work rule promulgated pursuant to

authority reserved to management, he could not impose a less severe penalty); International Bhd. of Elec. Workers, Local Union No. 1377 v. Leece-Neville Div. Sheller-Globe Corp., 550 F. Supp. 1071 (N.D. Ohio 1982) (where arbitrator found that work rule was violated, he could not modify the penalty set forth in the rule for its violation); cf. Posadas de Puerto Rico Assoc., Inc. v. Union de Trabajadores de la Industria Gastronomica, Local 610, 670 F. Supp. 58, 63 (D.P.R. 1987) (where agreement provides only that management reserves the right to establish reasonable regulations and that no employee will be discharged or disciplined without just cause and rule promulgated pursuant to management's reservation of right does not state an automatic penalty, arbitrator may properly decide whether violation of the rule warranted discharge).

In reviewing an arbitrator's award, it must also be kept in mind that arbitrators need not give their reasons for an award. Cannelton Indus., Inc. v. District 17, UMWA, 951 F.2d 591, 594 (4th Cir. 1991) (citing Enterprise Wheel, 363 U.S. at 598). In some instances, however, the reviewing court "must rely on the arbitrator's reasoning to determine whether he was applying contractual terms or his own brand of industrial justice' to resolve disputes." Id. at 594. Moreover, the implicit

findings of an arbitrator may be considered. Delta Queen, 889 F.2d at 604. For example, if "proper cause" is defined to include specific offenses, the arbitrator "cannot ignore the natural consequences of his finding that a listed offense was committed," even though he fails to make an express finding of proper cause. Id. To hold otherwise would allow arbitrators to shape employee discipline to their own liking by "declin[ing] to chant certain operative words." Id. "Thus, where an arbitrator fails to make an express finding of proper cause, he nevertheless will be bound if he finds that the employee committed certain underlying acts that constitute proper cause under the collective bargaining agreement." Id.

Here, the collective bargaining agreement between Mountaineer and OCAW reserves to Mountaineer the right to determine company policy not inconsistent with the agreement's provisions for "wages, hours of work, and working conditions." See, supra, page 2. The February 1991 substance abuse policy was implemented by Mountaineer in accordance with its reserved right and it accordingly must be deemed an integral part of the collective bargaining agreement. Indeed, OCAW has not challenged Mountaineer's right under the agreement to unilaterally impose the policy, adopted by Mountaineer primarily for the purpose of complying with

federally mandated directives related to the elimination of drugs in the workplace.

In addition, Mountaineer contractually retained "the power and the right to . . . suspend or discharge for proper cause." See, supra, page 2. The term "proper cause" is not defined in the agreement itself. Arbitrator Creo was thus obligated to look to the substance abuse policy for guidance in determining whether there was proper cause for discharging Watson. However, the reasonableness of the policy's penalty provision for a positive drug test was upheld by Arbitrator Beilstein and was not an issue presented to Arbitrator Creo.

The substance abuse policy is unambiguous insofar as it specifies the alternatives available to employees subject to random drug testing. After notification that they have been selected for testing, they have the one-time-only option of voluntarily entering the employee assistance program for drug abuse rehabilitation services. The option is not available to employees who choose instead to submit to the testing. Moreover, the policy could not be more clear with respect to the disciplinary action that will be imposed if the test reveals drug abuse, confirmed on re-analysis and not explained by a legitimate medical reason. There is but one penalty: immediate termination from

employment. No lesser penalty has ever been imposed by Mountaineer. Consequently, there is no "custom and practice" or "common law of the shop" indicating that Mountaineer's discipline of employees who test positive for drug abuse varies in its severity or that factors other than a confirmed positive test result may be considered in determining the penalty to be imposed.

Notwithstanding the abandonment by Watson and OCAW of the secondary inhalation argument and the arbitrator's rejection of their challenges to the propriety of Watson's testing and its validity, Arbitrator Creo concluded that there was "not just cause" for his termination. An examination of his reasoning demonstrates that in reaching that conclusion, he regarded Watson's fifteen years of "unblemished work history," and his two negative test results as circumstances to be considered. Moreover, it is obvious that Arbitrator Creo simply disagreed with Mountaineer's policy of not allowing an employee "caught" by a positive test to receive the same opportunity for rehabilitation as an employee who voluntarily entered the program before being "caught." Disagreeing with the policy, he chose to create an "individual exception[]" to it. In effect, he concluded that the policy's mandatory discharge penalty was unreasonable, an issue not before him and a matter that he

acknowledged was subject to Arbitrator Beilstein's award in favor of Mountaineer. Moreover, his interpretation of the contractual term "proper cause" for discharge conflicts with the plain language of the substance abuse policy, which unambiguously characterizes a positive drug test as cause per se for the disciplinary action of mandatory discharge.

In creating an individual exception for Watson, Arbitrator Creo ignored the plain language of Mountaineer's substance abuse policy, a policy which must be deemed an integral part of the collective bargaining agreement and thus a compelling source of guidance in interpreting the "proper cause" provision in the collective bargaining agreement. Although he states that there was no "Just cause" for termination under the circumstances of Watson's case, his stated reasoning demonstrates otherwise. He rejected all of Watson's challenges and concluded that the offense of testing positive for drugs was committed. Having made the finding that the positive test result was valid, his statement of "no just cause" is contrary to his factual findings and the policy's plain language. Moreover, having found proper cause, notwithstanding his statement to the contrary, he disregarded the mandatory penalty unambiguously stated in the substance abuse policy and consistently applied by Mountaineer. In doing so, he

ignored the language of the collective bargaining agreement that reserved to Mountaineer the right to determine policy and the right to discharge for proper cause, as those rights are exemplified in the substance abuse-policy.

By ignoring the plain language of the substance abuse policy and its mandatory penalty for testing positive for drugs Arbitrator Creo applied his own "brand of industrial justice" and based his award, not on a plausible reading of an integral part of the collective bargaining agreement,, but rather on his own personal notion of right and wrong. His award consequently does not "draw[] its essence from the collective bargaining agreement." It should be vacated.[7]

III. Conclusion

For the reasons stated, it is **ORDERED** that Mountaineer Gas Company's motion for summary judgment be, and it hereby is, granted. It is accordingly further **ORDERED** that the arbitration award entered by Arbitrator Robert Creo on August 25,, 1993" conditionally

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[7] Having concluded that the award should be vacated on the ground that it does not draw its essence from the collective bargaining agreement, the court does not reach Mountaineer's contention that its enforcement would be in violation of public policy and thus should be vacated on that basis.

reinstating Donald R. Watson and converting his discharge to a disciplinary suspension be, and it hereby is, vacated in its entirety.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED:
February 27, 1995

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER JR.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Entered March 21, 1996

No. 95-1724
CA-93-862-2

MOUNTAINEER GAS COMPANY, a corporation

Plaintiff - Appellee

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION; OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LOCAL 3-372; DONALD R. WATSON

Defendants - Appellants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk

AGREEMENT
BETWEEN
MOUNTAINEER GAS COMPANY
AND
OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION
LOCALS 3-372 AND 3-628

CHARLESTON, WEST VIRGINIA

1988-1991

ARTICLE II
Recognition

Section 1. Company recognizes the Union as the exclusive Representative of all the employees, as such term is defined and delimited in Section 3 of this Article, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided.* That any individual employee or a group of employees shall have the right at any time to present grievances to the Company and to have such grievances adjusted, without the intervention of the Union, as long as the adjustment is not inconsistent with the terms of this Agreement: *Provided further,* That the Union has been given opportunity to be present at such adjustment.

Section 2. It is agreed that there shall be no hindrance or interference

with the Management of the Company in its several departments, including the determination of the Company policy, which does not interfere with the conditions of this Agreement as affecting wages, hours of work, and working conditions. All rights of Management, except insofar as the same are expressly modified in the terms of this Agreement, are hereby reserved to the Company, and the Company specifically has the power and the right to manage the business and direct the working forces, including but not limited to, the right to hire, suspend or discharge for proper cause, promote, demote, to transfer employees from one job to another (provided, however, that no employee may be permanently transferred from one basic seniority unit to another, without his permission), to lay off employees in accordance with seniority, as specified herein, to reduce working hours, to move or to close any departments or other segments of the business because of lack of work, or to otherwise generally manage the Company's business.

Nothing in this Section shall be construed to supersede or nullify any of the provisions contained in other Articles.

Section 3. (a) The term "employee", as used in this Agreement, shall include all production and maintenance employees of the Company in the said bargaining unit, but shall exclude all clerical,

supervisory, executive, administrative, professional, temporary employees, and all others excluded by law. "Temporary employees" are hereby defined to mean those employees hired for a specific project or for a specified length of time.

(b) In accordance with the requirement of Section 1, hereunder, an employee will be classified as a Regular employee following any three months' period in which the employee has worked at least 312 hours of regularly scheduled work exclusive of overtime. *Provided,* That he meets the Company's requirements as to ability and efficiency, integrity, and physical fitness: P*rovided, further,* That he has submitted record of birth which is satisfactory to the Company.

(c) An employee shall lose his classification as a Regular employee under the following conditions:

1. Resignation.
2. Discharge for cause.
3. Acceptance of other employment except as work either in progress
4. Refusal to accept reemployment within 72 hours after receipt of notification by the Company that employment is available in the basic seniority unit from which the employee was laid off because of lack of work. Such notice may be given by letter at the employee's last known address, by

telephone or by personal contact.

5. Lay-offs of more than four years duration.

(d) The Company agrees to notify the Union of an offer of reemployment made by the Company to an employee. Such notice will be either a copy of the notice sent to the employee, or will be a notice stating in which other manner the employee was notified.

ARTICLE XIII
Termination Pay

Nothing herein contained shall be construed to interfere with the right of the Company to suspend or discharge or lay off an employee for just cause: *Provided, however,* That when a reduction in the Regular personnel is necessary, the employees whose services are to be discontinued shall be given five days' advance notice thereof, and in the event such notice is not given, the Company will pay such employee the equivalent of five days' pay at this regular rate.

ARTICLE XXVII
Grievances

If an employee or group of employees shall have a grievance to present to the Company, he or they may seek redress as follows:

Step I. Within thirty (30) days after the occurrence giving rise to the grievance, present his or their case to the immediate supervisor, at which time he or they may be accompanied by his or their Committeeman if he or they so desire. The immediate supervisor shall within seven (7) days from such meeting give his answer to the employee or employees concerned and the Committeeman involved. If said answer is in writing, a copy thereof will also be provided to the Secretary of the Local involved.

Step 11. If a settlement is not obtained in Step 1, he or they shall present the case in writing through the immediate supervisor to the proper Division manager within twenty (20) days after the completion of Step 1. The Division manager and/or his designated representative shall within ten (10) days investigate and meet with the aggrieved employee, or one member of a group of aggrieved employees, and not more than three (3) members of the Worker's Committee, at a mutually agreed location. The Division manager and/or his designated representative shall within ten (10) days from such meeting, communicate his decision in writing through the immediate supervisor to the employee or employees concerned, the Worker's Committeemen involved, and Secretary of each Local.

Step III. If result satisfactory to the employee or employees have not been

obtained in Step II, the case may then be submitted, within thirty (30) days after completion of Step II, for final determination by the Company, to the Manager of Labor Relations. The Company shall promptly meet with the aggrieved employee, or one member of a group of aggrieved employees, and not more than three (3) members of the Worker's Committee. Within ten (10) days (excluding Saturday, Sunday and Holidays) after such meeting, the Company will communicate its decision in writing to the Union.

It is agreed that if a grievance is not referred or appealed to the next Step within the specified time limits, as set out in Steps I, II, and III above, it shall be considered settled without prejudice. The management agrees that it will meet with the Worker's Committee at such times as may be agreeable, and those members of the Committee who are caused to lose time from their regular schedules because of such meetings shall suffer no loss of pay.

ARTICLE XXVIII
Arbitration

Section 1. If there arises any controversy between the employee or a group of employees and the Company, with respect to the interpretation of the provisions of this Agreement, or wherein there is alleged a violation of the terms

of this Agreement, such controversy shall first be treated as an ordinary grievance and processed through the three steps, as provided for in Article XXVII.

An earnest effort shall be made by the Company and the Union to reach an amicable adjustment of all grievances.

Section 2. In the event an amicable adjustment of a grievance, as defined in Section 1 of this Article, cannot be reached by the grievance procedure as set out in Article XXVII of this Agreement, the matter shall be submitted to Arbitration as provided in Section 3 hereof, after notice is given in writing within thirty (30) days after the completion of the grievance procedure. Unless notice is given within thirty (30) days as set forth above, the grievance shall be considered settled without prejudice.

Section 3. (a) If any controversy or grievance arising under the terms of this Agreement cannot be adjusted and settled in the manner above provided, the same shall be promptly submitted to a Board of Arbitration, to be selected as follows: One to be chosen without delay by the Company and one to be chosen without delay by the Union. These two shall meet within ten (10) calendar days and, if they cannot reach agreement, the Union arbitrator shall, within thirty (30) calendar days, notify the Company arbitrator of the Union's desire to select a third member to complete the

Board of Arbitration. In the event such notice is not timely given, the matter shall be considered to have been settled. If these two cannot reach an agreement as to the selection of a third member, the Federal Mediation and Conciliation Service shall appoint said third member to complete the Board of Arbitration. When the third member has been thus selected, the parties will attempt to provide him with a joint statement of the issue to be arbitrated. The Board of Arbitration shall limit its decision to issue or issues thus submitted by the parties and shall have no authority to amend, add to, or subtract from this Agreement. The decision of such Board of Arbitration shall be rendered without delay, and the decision of the majority of said Board shall be final and binding on all parties involved in such grievance and shall conclusively determine the same.

(b) If an employee's case is at any stage decided in his favor, he will be put in the same financial position by the Company as if it had been originally so decided, and his seniority shall not be affected.

(c) Any number of grievances may be presented at the same arbitration hearing or hearings so long as the latest of those selected for hearing was appealed to arbitration no more than sixty (60) days after the date first was appeared to arbitration.